(1)

FILED

No. 99-588 OCT 4 1999

OFFICE OF THE CLERK

In The

Supreme Court of the United States

VICTORIA INDEPENDENT SCHOOL DISTRICT, *et al.*,

Petitioners,

vs.

DWIGHT HARRIS and GENE MARTIN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

ROGER D. HEPWORTH
Counsel of Record
HENSLEE, FOWLER, HEPWORTH & SCHWARTZ, L.L.P.
800 Frost Bank Plaza
816 Congress Avenue
Austin, Texas 78701-2443
(512) 708-1804

Attorneys for Petitioners Kornfuehrer, Cain, Green, Pollard and Brezina, in their individual capacities

ARTURO G. MICHEL
PHILIP D. FRAISSINET
Of Counsel
BRACEWELL & PATTERSON, L.L.P.
711 Louisiana Street, Suite 2900
Houston, Texas 77002-2781
(713) 223-2900

Attorneys for Victoria Independent School District and all Petitioners in their official capacities

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

12688

QUESTIONS PRESENTED

(1) The court below held that a government employee's criticism of a supervisor's performance and management style is constitutionally protected merely because the speaker represents the views of other employees. Does this new category of protected speech conflict with First Amendment precedent that affords protection only when a government employee speaks as a citizen upon matters of public concern?

(2) The court below, in applying the *Pickering* balancing test, required the Victoria ISD to prove that the respondents' speech actually disrupted school operations. Does this requirement conflict with decisions by this Court and other courts of appeal that require that the government need only show a reasonable prediction of disruption to justify actions based on otherwise protected speech?

(3) The speech that is claimed protected demanded termination of the supervisor and threatened faculty revolt. Was the potential disruptiveness of the speech enough to outweigh whatever First Amendment value it might have had?

(4) Two government employees claim their speech criticizing a supervisor's performance and management style, demanding their supervisor's termination and threatening faculty revolt was constitutionally protected merely because the speakers represent the views of other employees. Was the law so "clearly established" in January of 1996 that any reasonable officials would know such speech was protected and thus be deprived of their qualified immunity?

LIST OF PARTIES

Petitioners are the Victoria Independent School District, a public school district located in Victoria County, Texas, and Margaret Easley, Reuban Murray, and Theresa Guitierrez, in their official capacities only, and Clay Cain, Paul Kornfuehrer, Randy Pollard, Ivan Green and Robert P. Brezina in both their individual and official capacities. For simplicity, the school district and the individual defendants sued only in their official capacities will be referred to as "Victoria ISD."

Respondents are Gene Martin and Dwight Harris.

TABLE OF CONTENTS

Page

Questions Presented i

List of Parties ii

Table of Contents iii

Appendix vi

Table of Authorities vii

Opinions Below 1

Statement of Jurisdiction 1

Constitutional Provision Involved 1

Statement of the Case 2

I. Proceedings Below 2

II. Relevant Background Facts 2

Reasons for Granting the Petition 8

I. This Petition presents important First Amendment and qualified immunity questions that should be settled by this Court 8

II. The Fifth Circuit's ruling that employee representatives are entitled to greater speech rights, regardless of the content, context, or form of the speech, conflicts with the decisions of this Court and other Courts of Appeals 10

III. The Fifth Circuit's application of the *Pickering* balancing test conflicts with the decisions of this and other Courts by requiring the school district to prove actual disruption 14

IV. The panel's decision denying qualified immunity conflicts with long established Supreme Court authority and effectively eviscerates the "qualified immunity" defense 16

TABLE OF CONTENTS – Continued

Page

A. The speech was not a matter of public concern under any "clearly established" law.. 18

1. Context 19

2. Content 19

3. Form 21

B. The law was not clearly established 21

1. Plaintiffs admit this is a new issue 21

2. The Fifth Circuit panel admits not addressing the factual scenario before..... 22

3. The Fifth Circuit cited cases decided after the transfer as "clearly established" law 22

4. The clearly established law was that only employee speech reporting corruption or wrongdoing was of public concern..... 23

5. Reasonable minds (including the judges) differ, thus the decision conflicts with well-established Supreme Court authority..... 24

V. The potential disruptiveness of the speech outweighs whatever First Amendment value it may have had resulting in precedent that hamstrings governmental officials and conflicts with *Connick v. Myers* and *Pickering v. Board of Education*..... 25

TABLE OF CONTENTS – Continued

Page

VI. The Court's refusal to grant immunity conflicts with the Ninth Circuit's decision in *Moran v. State of Washington* and the eight other circuits cited therein which hold that the law is rarely if ever sufficiently "clearly established" to preclude qualified immunity when the context-intensive, case-by-case *Pickering* balancing analysis is required 27

Conclusion 29

APPENDIX

Page

Panel Decision and Dissent of The United States Court of Appeals For The Fifth Circuit Decided March 4, 1999 ..... App. 1

Order of The United States District Judge Granting Summary Judgment on July 30, 1997..... App. 24

Order Denying Motion for Rehearing ..... App. 39

Affidavit of Robert Brezina ..... App. 42

Concerns at Victoria High School Letter..... App. 48

Reassignment Letter – Dwight Harris ..... App. 51

Reassignment Letter – Gene Martin ..... App. 55

Minutes of Grievance Hearing ..... App. 59

Excerpts From Deposition of Dwight Harris.... App. 65

Excerpts From Deposition of Gene Martin..... App. 68

Excerpts From Deposition of Robert Brezina.... App. 71

Excerpts From Deposition of Theresa Gutierrez ... App. 76

Excerpts From Deposition of Randy Pollard.... App. 79

Excerpts From Deposition of Clay Cain ..... App. 82

Excerpts From Deposition of Reuban Murray... App. 85

Excerpts From Deposition of Ivan Green ..... App. 87

Excerpts From Deposition of Paul Kornfuehrer ... App. 88

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635 (1987) 17, 21, 27

Arnett v. Kennedy, 416 U.S. 134 (1974) 27

Benningfield v. City of Houston, 157 F.3d 369 (5th Cir. 1998), *cert. denied*, 119 S.Ct. 1457 (1999)....22, 23

Brewster v. Bd. Of Educ. Of the Lynwood Unified Sch. Dist., 149 F.3d 971 (9th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. (1999) 14, 15

Buazard v. Meredith, 172 F.3d 546 (8th Cir. 1999)..12, 13

Conn v. Gabbert, 119 S.Ct. 1292 (1999) 17

Connick v. Myers, 461 U.S. 138 (1983)..... *passim*

Davis v. Scherer, 468 U.S. 183 (1984)..... 17

Harlow v. Fitzgerald, 457 U.S. 800 (1982)..... 16

Harris v. Victoria Indep. Sch. Dist., 168 F.3d 216 (5th Cir. 1999) 4, 8, 11, 12

Jeffries v. Harleston, 52 F.3d 9 (2d Cir. 1995), *cert. denied*, 516 U.S. 862 (1995)..... 14

Malley v. Briggs, 475 U.S. 335 (1986).....16, 25

Moran v. State of Wash., 147 F.3d 839 (9th Cir. 1998).....27, 28

Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)..... 17

Pickering v. Board of Ed. Of Tp. High School Dist. 205, Will County, Illinois, 391 U.S. 563 (1968).. *passim*

TABLE OF AUTHORITIES – Continued

Page

Pierson v. Ray, 386 U.S. 547 (1967) 22

Procunier v. Navarette, 434 U.S. 555 (1978) 22

Thomson v. Scheid, 977 F.2d 1017 (6th Cir. 1992), *cert. denied*, 508 U.S. 910 (1993) 13

Tuttle v. Missouri Dept. of Agriculture, 172 F.3d 1025 (8th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3106 (1999) 12, 13

Wallace v. Texas Tech University, 80 F.3d 1042 (5th Cir. 1996) 19, 20, 23

Warnock v. Pecos County, Tex., 116 F.3d 776 (5th Cir. 1997) 22, 23

Waters v. Churchill, 511 U.S. 661 (1994) ...14, 18, 25, 26, 28

Wilson v. Layne, 119 S.Ct. 1692 (1999) 10, 17, 22, 24, 25

Wilson v. University of Texas Health Center, 973 F.2d 1263 (5th Cir. 1992), *cert. denied*, 507 U.S. 1004 (1993) 20

Wood v. Strickland, 420 U.S. 308 (1975) 22

CONSTITUTION

U.S. Const. amend. 1 ..... *passim*

STATUTES

28 U.S.C. § 1331 .....2, 7

28 U.S.C. § 1343 .....2, 7

42 U.S.C. § 1983 2

PETITION FOR WRIT OF CERTIORARI

Victoria ISD, *et al.*, petition for a writ of certiorari to review the panel decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The panel opinion and dissenting opinion of the United States Court of Appeals for the Fifth Circuit (App. at 1) is reported at 168 F.3d 216. The relevant orders of the district court (App. at 24) are unreported. The denial of Motion for Rehearing and En Banc Rehearing (App. at 39) is unreported.

STATEMENT OF JURISDICTION

(i) The order of the Fifth Circuit panel was filed on March 4, 1999;

(ii) Motion for Panel Rehearing and for En Barc Rehearing was denied on July 7, 1999.

This Court has jurisdiction to review this order on a writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech. . . .

First Amendment to the United States Constitution.

STATEMENT OF THE CASE

I. Proceedings Below

Plaintiffs Dwight Harris and Gene Martin filed suit pursuant to 42 U.S.C. § 1983 alleging violation of their First Amendment right to freedom of speech. Their basis for federal jurisdiction was 28 U.S.C. § 1331 and § 1343.

On July 30, 1997, Judge John Rainey granted summary judgment to all defendants. Plaintiffs appealed to the Fifth Circuit Court of Appeals, who on March 4, 1999 reversed the decision on a 2 to 1 panel decision, with Justice Smith filing a dissent. Motions for Panel and En Banc Rehearing were denied on July 7, 1999.

II. Relevant Background Facts

Harris and Martin (hereinafter "plaintiffs") are both employees of Victoria Independent School District and at the beginning of the 1995-1996 school year, they taught at Victoria High School. In August of 1995, plaintiffs complained to Superintendent Robert Brezina about the performance of VHS Principal Melissa Porche. Plaintiffs informed Mr. Brezina that they believed Porche lacked respect for the faculty and had problems making decisions and handling the scheduling of classes. They presented Mr. Brezina with a written list of complaints about Porche entitled "Concerns at Victoria High School". Mr. Brezina assured plaintiffs that he would investigate their concerns (App. at 42 and 48-50).

Within hours of speaking with Mr. Brezina, plaintiffs, without permission, placed the "Concerns" letter in each teacher's mailbox (App. at 43). The letter attacked and belittled Porche. It addressed the following areas: 1) scheduling; 2) decision making; 3) no respect for teachers;

4) she is a bully; 5) poor decision making skills; 6) vindictive; and 7) does not consider consequences of decision (App. at 48). Mr. Brezina believed that distribution of this letter before he had an opportunity to talk to individuals at VHS tainted any investigation he could conduct, so he retained an educational consultant, Dr. Fairman, to conduct an organizational health survey in an effort to identify and address any problems at VHS. After the survey was completed, Brezina met with the VHS faculty and administration to address the problem areas (App. at 43).

Mr. Brezina requested that faculty members from the Site Based Management (SBDM) Committee (including the plaintiffs), Dr. Fairman, and Principal Porche work together in an Organizational Health Committee to assist in facilitating a resolution to the conflicts and/or concerns. The superintendent did not include the community members of the SBDM on the Committee to work with Dr. Fairman. He also instructed this group to keep all discussions made during Committee meetings confidential so as not to hinder the group's ability to resolve the conflicts and/or concerns. After several meetings, the Committee drafted a plan to improve the organizational health of VHS (App. at 43). After reviewing the Committee's draft plan, Mr. Brezina assured the team that he would actively and diligently attempt to use proven methods to resolve some or all of the issues (App. at 44).

During a December 8, 1995 meeting with the Organizational Health Committee including Superintendent Brezina, Principal Porche and Dr. Fairman, and prior to the implementation of the final plan, according to Brezina, Mr. Harris and Mr. Martin demanded that their

instructional leader, Principal Porche, be terminated; otherwise, they threatened they would revolt. Brezina testified by affidavit that Mr. Harris said words to the effect that there was "no way in the world" he could support the leadership at Victoria High School (App. at 44). Harris and Martin alleged, and the Fifth Circuit assumed, as it was required to do, that during the December 8 meeting they told Brezina that many of the faculty believed Porche was not following the improvement plan, that her replacement was necessary to improve the situation, and that the faculty would revolt if Brezina did not do something. *Harris, et al. v. Victoria Indep. Sch. Dist., et al.*, 168 F.3d 216, 221 (5th Cir. 1999). In addition, according to Brezina, after making the above comments, Mr. Harris and Mr. Martin deliberately turned their chairs away from Principal Porche, so that their backs were toward her. Mr. Harris denied that they turned their backs. Thus, the courts must accept Mr. Harris' version on summary judgment. According to Brezina, Mr. Harris stood up, crossed his arms, very conspicuously stared out the window and made it clear he would not participate any further in the Committee meeting (App. 44). Harris also denies he indicated he would not participate. Mr. Brezina considered their conduct at that meeting to be disrespectful to himself, Principal Porche and to the process they were working on. Mr. Brezina later learned that Mr. Harris and Mr. Martin began placing telephone calls to members of the Victoria ISD Board of Trustees in which they made the same demands and threats. Mr. Harris admitted these calls were as an individual person and not to reflect the will of the faculty. Brezina testified by affidavit that based on all of this, it appeared to him that Mr. Harris and Mr. Martin had completely abandoned

their support and commitment to the goals and plan for improvement and instead sought to oust their supervisor and instructional leader, Principal Porche (App. at 44). At deposition, he testified that it was the December 8th action and speech led him to the conclusion that they were unable and/or unwilling to maintain the commitment to the goals and to the decision to reassign.

Based on Mr. Harris and Mr. Martin's demands to have Melissa Porche removed as principal of Victoria High School and actions at that December 8th meeting, Mr. Brezina concluded that Mr. Harris and Mr. Martin lacked the necessary commitment to the goals developed in the plan (App. at 45). He believed Mr. Harris and Mr. Martin's actions would disrupt the learning environment, undermine the authority of those responsible for the implementation of the plan and hinder the close working relationships that were necessary in order for the plan to work. He believed that Mr. Harris and Mr. Martin's lack of support for the plan and Ms. Porche would disrupt the efforts to improve VHS. This was based on Mr. Brezina's belief that the plan was developed specifically with Ms. Porche as Principal of VHS and that she was an integral component to the plan. He also believed that as members of the Committee working with Dr. Fairman, Mr. Harris and Mr. Martin's support of the plan was essential to its success in resolving the concerns they identified in the "Concerns" letter (App. at 45). This was echoed by Mr. Harris in his deposition. He stated that "if the faculty saw that we didn't have any confidence in that plan they certainly weren't going to buy into it." (App. at 69). Mr. Harris later in his deposition acknowledged that he and Mr. Martin were saying "It doesn't matter what plan we put together, if we don't go out there and try to convince

the faculty that we believe it's going to work, it's not going to work." (R. at 306). Mr. Brezina thus believed that failing to support Ms. Porche was tantamount to failing to support the plan. Therefore, as superintendent of schools, he believed it was necessary and in the best interest of Victoria ISD to reassign and transfer Mr. Harris and Mr. Martin to other schools within the district, at no loss of pay, seniority or benefits (App. at 45).

Plaintiffs filed a grievance claiming they had been transferred in violation of their right to freedom of speech (App. at 59). They claimed their speech was protected, even though it only concerned employment issues, because they spoke as representatives of the faculty (App. at 59 and 61). The attorney for the administration argued to the board that plaintiffs attempted to undermine the authority of the principal by circulating the letter which attacked her and later that they took the position at the December 8th meeting that they would not support the plan if it included Ms. Porche (App. at 59-63). The attorney said there is a line over which an employee may not go. An employee may not be insubordinate, disrespectful or unprofessional (App. at 60). The attorney argued to the board that not even governmental entities are required to allow the employees to dictate who their boss is going to be and that the plaintiffs' abandonment of three months of work on the improvement plan supported the decision to transfer the plaintiffs to allow the improvement plan to work (App. at 61). He also argued that the faculty, including the members of the Site Based Team (the plaintiffs) have a duty and responsibility to try to make things better, not to order the superintendent to remove people from their positions or attempt to dictate

to him what is in the best interest of the district (App. at 62).

The board members considered the testimony and arguments and voted to uphold the transfer.

Plaintiffs filed suit in federal court alleging violation of their First Amendment rights against Victoria ISD and all board members in their official capacities and individually against the superintendent and the board members who voted to deny the grievance. Their basis for federal jurisdiction was 28 U.S.C. §§ 1331 and 1343.

Defendants answered the suit in two groups: 1) Victoria ISD and all defendants in their official capacity, and 2) all defendants in their individual capacities. Each group of defendants filed a Motion for Summary Judgment.

On July 30, 1997, Judge John Rainey granted summary judgment to all defendants (App. at 24-38). He found that the speech was not protected. He followed established Fifth Circuit authority that speech by public employees in their role as employees is of public concern only when reporting corruption or wrongdoing to higher authorities. Neither instance applied in this case. The judge also found that the plaintiffs' criticisms of their superior were not made against a backdrop of public debate (App. at 24-38).

Since this ruling disposed of the entire case, the judge did not rule on the qualified immunity defenses of the individual defendants.

The Fifth Circuit Court in a split panel reversed the grant of summary judgment and held that the speech was protected because it was requested of them by the administration as committee members (App. at 1-18). The panel

also denied the individual defendants' qualified immunity. Justice Smith dissented (App. at 18-23). He would have held the speech was not a matter of public concern.

On July 7, 1999, Motions for En Banc Hearing and Motions for Panel Rehearing were denied (App. at 39-41). Justice Smith again dissented (App. at 41).

REASONS FOR GRANTING THE PETITION

I. This Petition presents important First Amendment and qualified immunity questions that should be settled by this Court.

The Fifth Circuit's decision creates an entirely new and extraordinary category of protected employee speech under the First Amendment. The essence of the speech in this case involved employee complaints about a supervisor's performance and management style. The Fifth Circuit disregarded that the respondents spoke as employees and not citizens and addressed only internal employment matters rather than broader issues of public concern. Instead, the Fifth Circuit afforded constitutional protection to the respondents' complaints about their supervisor because they allegedly spoke as representatives of other employees. As Judge Smith correctly stated in his dissent, the majority decision "adopts too expansive a definition of protected speech for public employees – and thereby takes another step toward constitutionalizing the management of public schools. . . . " 168 F.3d at 225 (App. at 18).

This Court has never held that employee complaints about a supervisor are protected merely because they allegedly represent the views of other employees. As shown below, this novel protection of governmental

employee speech conflicts with the general First Amendment speech principles established in this Court's decisions. The Fifth Circuit's decision also conflicts with several federal appellate courts' decisions regarding the protection of government employee speech. The Fifth Circuit's decision will have profound effects not only on public school employers, but on other governmental employers within the court's jurisdiction, and this Court should settle this important question of federal law.

The Fifth Circuit also established a higher burden for governmental employers than required by this and other courts under the *Pickering* balancing test. The Fifth Circuit required the Victoria ISD to prove that Harris and Martin's speech *actually disrupted* school operations to justify its employment decisions based on their actions. The panel majority of the Fifth Circuit completely disregarded the reasonableness of Superintendent Brezina's prediction of disruption following Harris' and Martin's actions. As shown below, this holding conflicts with the decisions of this Court and several courts of appeal, which require only that an employer show a reasonable prediction of disruption to justify employment decisions. The Fifth Circuit's decision will require public employers to do exactly what this Court has said they should not be required to do, which is "allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Connick v. Myers*, 461 U.S. 138, 152, 103 S.Ct. 1684, 1692 (1983). This Court should grant review of the Fifth Circuit's decision and restore to public employers the flexibility to make reasonable determinations about personnel matters as contemplated in the Court's free speech decisions.

The panel majority's denial of qualified immunity based on cases decided after the governmental action was taken puts public officials in the Fifth Circuit in the position of being "expected to predict the future course of constitutional law" contrary to this Court's decision in *Wilson v. Layne*, 119 S.Ct. 1692 (1999). In fact, this decision effectively eliminates the "qualified immunity" defense.

It also puts government officials at the mercy of any person who claims to be speaking for a group of employees, no matter what is said. Under this decision employees could band together, demand the termination of their supervisor and threaten revolt and the governmental officials could not even reassign the employees without facing potential liability. This will sorely limit, if not eliminate, the ability of governmental officials to maintain efficiency and avoid disruption.

II. The Fifth Circuit's ruling that employee representatives are entitled to greater speech rights, regardless of the content, context, or form of the speech, conflicts with the decisions of this Court and other Courts of Appeals.

This Court has taught that the initial threshold to establishing a constitutional free speech violation in the public employment context is proving that speech involves a matter of public concern. *See Connick*, 461 U.S. at 146, 103 S.Ct. at 1690. The heart of the "public concern" doctrine requires that in order to enjoy constitutional protection, speech must be made primarily in an employee's role as a *citizen* and pertain to matters of "political, social, or other concern to the community." *Id.* On the other hand, when one speaks as an *employee* on matters of personal interest, "a federal court is not the

appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Id.* at 147, 103 S.Ct. at 1690. This Court has instructed that the content, form, and context of a given statement determine whether speech pertains to a matter of public concern. *Id.* This three-pronged approach, however, cannot be divorced from the fundamental premise of *Pickering* and its progeny, as thoroughly described by the Court in *Connick*, that for speech to be constitutionally protected, it must be issued primarily in one's capacity as a citizen rather than employee.

The Fifth Circuit disregarded the distinction drawn in *Connick* between "employee speech" and "citizen speech." Indeed, the Fifth Circuit's reversal of the district court was actually based on the notion that Harris and Martin allegedly spoke in their capacities as elected faculty representatives on a committee established by Brezina to address the very employment concerns first raised by Harris and Martin about their supervisor. The panel majority reasoned that Harris and Martin were faced "with the choice of either telling the truth and fulfilling their duty as committee members or keeping silent and frustrating their purpose and function on the committee." 168 F.3d at 222. The court further stated that although Harris and Martin had personal interests in their speech, they also "had an interest as committee members in achieving the goals the committee set for itself and the school." *Id.* The majority acknowledged that the outcome of this case "might have been different had the Plaintiffs not been committee members reporting the views of the faculty at large to the administration." *Id.*

The Fifth Circuit majority's heavy reliance on Harris and Martin's alleged duties as committee members actually undercuts, rather than supports, the protection of their speech. Harris and Martin have never alleged, and the Fifth Circuit did not find that they spoke as citizens rather than employees. Harris and Martin have also acknowledged that the subject matter of their speech – complaints about their supervisor's job performance and management style – is generally not subject to constitutional protection. (R. 572). The Fifth Circuit majority completely ignored the content of Harris and Martin's speech, which, boiled down to its essence, constituted nothing more than a demand for their supervisor's removal. 168 F.3d at 221-222.

This Court has never held that performance of one's employment duties, even the alleged representation of other employees, is enough to elevate otherwise unprotected speech to constitutionally protected status. To the contrary, *Connick* shows that a government employee's speech is unprotected unless it is made in one's capacity as a citizen and pertains to social, political, or other issues of concern to the community. 461 U.S. at 146, 103 S.Ct. at 1690. Moreover, several courts of appeals have very clearly held that employment decisions based on speech related to performance of an employee's duties is not subject to federal court review. For example, the same month the Fifth Circuit decided this case, the Eighth Circuit held that unless a government employee is speaking as a concerned citizen, and not just as an employee, the speech does not fall under the protection of the First Amendment. *See Buazard v. Meredith*, 172 F.3d 546, 548 (8th Cir. 1999); *Tuttle v. Missouri Dept. of Agriculture*, 172 F.3d 1025, 1034 (8th Cir. 1999). In *Buazard*, a police officer

alleged he was demoted for statements he made in response to his supervisor's questioning and as part of an investigation of official misconduct by two other officers and for his refusal later to change those statements. 172 F.3d at 548. The Eighth Circuit held that the speech was not protected because it was not issued in the officer's capacity as a concerned citizen and instead consisted of job-related statements made at the request of the chief of police as part of an official investigation. *Id.*[1] Likewise, in *Thomson v. Scheid*, 977 F.2d 1017, 1021 (6th Cir. 1992), the Sixth Circuit held that a government investigator's report of fraud by a public official was not protected because the plaintiff was acting in the course of his employment and was "not speaking out as a citizen. . . . "

The Fifth Circuit's decision is in clear conflict with these decisions of this Court and other courts of appeal. The Fifth Circuit majority ignored the employee/citizen distinction and created a special class of protected speakers – alleged employee representatives – who apparently will be afforded constitutional protection for speech that would clearly not be protected if issued by other employees. This is not the law of this Court or of any other circuit court. This Court should grant this petition and reverse the Fifth Circuit on this issue.

---

[1] The same month, the Eighth Circuit also determined that a government employee's complaints about salaries, promotions, and safety issues, allegedly affecting employees other than himself, were not protected because he spoke out as an employee, and not as a concerned citizen. *Tuttle v. Missouri Dept. of Agriculture*, 172 F.3d 1025, 1034 (8th Cir. 1999) (*citing Connick*, 461 U.S. at 147, 103 S.Ct. at 1684, quotation omitted).

III. The Fifth Circuit's application of the *Pickering* balancing test conflicts with the decisions of this and other courts by requiring the school district to prove actual disruption.

If a public employee's speech pertains to a matter of public concern, the employee must demonstrate that her interest in speaking on that matter is greater than the employer's interest in promoting the efficiency of the public services it performs. *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734-35 (1968); *Connick*, 461 U.S. at 142, 103 S.Ct. at 1687. The courts have identified various legitimate employer interests, such as effective and efficient fulfillment of its public functions, maintaining proper discipline, and ensuring close working relationships between employees and supervisors. 461 U.S. at 151, 103 S.Ct. at 1692. This Court has elaborated on its *Pickering* test and made clear that an employee's speech does not have to cause *actual* disruption to these governmental interests to justify restrictions on the speech; the government need only show a *reasonable prediction* of disruption. *See, e.g., Waters v. Churchill*, 511 U.S. 661, 114 S. Ct. 1878, 1887 (1994). Various courts of appeal have also held that an employer does not have to show actual injury to its operations, but only a threat of interference with its legitimate interests. *See Jeffries v. Harleston*, 52 F.3d 9, 13 (2d Cir. 1995) ("the extent of the injury caused by the employee's speech need not be actual; rather, the government's burden is just to show that the speech threatened to interfere with government operations."), *cert. denied*, 516 U.S. 862, 116 S. Ct. 173 (1995); *see also, Brewster v. Bd. Of Educ. Of the Lynwood Unified Sch. Dist.*, 149 F.3d 971, 979 (9th Cir. 1998) (" . . . public employers need not allege that an employee's

expression actually disrupted the workplace; 'reasonable predictions of disruption are sufficient;' ") (quoting *Waters*, 511 U.S. at 673, 114 S.Ct. 1878), *cert. denied*, 119 S.Ct. 1252 (1999).

The Victoria ISD provided evidence that Brezina reasonably believed Harris and Martin's actions would undermine the authority of those responsible for the implementation of the improvement plan, hinder the close working relationships between the administration and faculty necessary for the plan to work, and potentially disrupt the learning environment at the school. (R. at 268-69.) Brezina reasonably believed that Harris and Martin's support was necessary to resolve the relationship issues they raised in their "Concerns Memo." (*Id.*) Brezina's belief was fully supported by Harris and Martin's own admissions. For example, Harris testified:

> "we felt like if the faculty saw that we didn't have any confidence in that plan they certainly weren't going to buy into it if we were running around saying, 'Hey, it ain't going to work.' "

(R. 305.) Harris further acknowledged that:

> "we were saying 'It doesn't matter what plan we put together, if we don't go out here and try to convince the faculty that we believe it's going to work, it's not going to work.' "

(R. 306.)

Based on this and other evidence, Brezina reasonably believed that Harris and Martin's statements about Porche were tantamount to a lack of support for the plan developed by the committee. (R. 268-69.) Therefore, Brezina determined that in order to prevent disruption to the efforts to improve VHS, Harris and Martin would be reassigned to teaching positions at other schools in the District. (*Id.*)

The Fifth Circuit improperly ignored *Pickering* and its progeny by ruling that the Victoria ISD had to prove actual disruption. The majority ruled that the Appellees did not offer actual evidence that Harris and Martin's speech disrupted the school's operations. 168 F.3d at 216 (App. at 12). The Fifth Circuit majority failed even to address the *reasonableness of the prediction* of disruption, and as such, has decided an important federal question in a way that conflicts with relevant decisions of the Supreme Court and several courts of appeals. This Court should grant this petition and reverse the Fifth Circuit on this issue.

IV. The panel's decision denying qualified immunity conflicts with long established Supreme Court authority and effectively eviscerates the qualified immunity defense.

It is now familiar law that public officers acting in their official capacities are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Since the watershed *Harlow* decision the qualified immunity defense has been defined quite broadly by the Supreme Court. "[I]t provides ample protection to all but the plainly incompetent or those who knowingly violate the law . . . [I]f officers of reasonable competence could disagree on th[e] issue [whether or not a specific action was constitutional], immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Regardless of whether a constitutional violation occurred, the official should prevail if the right asserted by plaintiff was not clearly established or

an official could reasonably believe his particular conduct was lawful. See *Wilson v. Layne*, 119 S.Ct. 1692 (1999) (officers entitled to qualified immunity despite finding of a constitutional violation). Moreover, the plaintiff bears the burden of proving that the rights they claim were "clearly established" at the time of the violation. See *Davis v. Scherer*, 468 U.S. 183, 197 (1984).

To be considered "clearly established" for the purposes of qualified immunity analysis, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The Supreme Court has recognized that the operation of the Harlow "clearly established rights" standard "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Id.* at 639. Hence, the Supreme Court has directed that the inquiry into whether or not a claimed right was "clearly established" must focus upon the right not in a general, abstract sense, but rather in a practical, "particularized" sense. *Id.* at 640.

A court evaluating a claim of qualified immunity "must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation." *Conn v. Gabbert*, 526 U.S. ___ (slip opinion at 4), 119 S.Ct. 1292 (1999).

In analyzing whether the speech involved in this or any First Amendment case is protected, the first issue is to determine whether the speech is constitutionally protected. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Pickering v. Board of Education*,

391 U.S. 563, 569 (1968); *Waters v. Churchill*, 511 U.S. 661 (1994).

Whether the speech is protected involves a two-step analysis. First, is the speech a matter of public concern. *Connick v. Myers*, 461 U.S. 138. This is a question of law. *Id.* at 148 n. 7. Second, if the speech does involve public concern, the court must balance the free speech interest of the citizen against the "interests of the state, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education*, 391 U.S. 563, 569 (1968). This also is a question of law. *Connick* at 148 n. 7.

For plaintiffs to prevail on a qualified immunity defense, they must demonstrate that any reasonable official would recognize that the transfers were matters of public concern and that the interests of the plaintiffs in speaking outbalances the interests of the school district in avoiding disruption and maintaining efficiency in providing education to the public school students. As shown below, neither of these issues were clearly established in January of 1996, nor are they at the present time.

A. The speech was not a matter of public concern under any "clearly established" law.

In order for speech to be constitutionally protected, it must be of public concern. *Connick* at 146. "Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record." *Id* at 147-148.

In this case, the Fifth Circuit ignored the content of the speech and carved out a new area of speech of public concern, that of representational speech, apparently

regardless of its content. Plaintiffs alleged that their speech at the December 8th meeting was merely relating the viewpoints of the faculty, and since it was in the context of a campus improvement committee the speech is a matter of public concern regardless of the form or content.

The content and form of that speech must be considered. The superintendent, in his sworn affidavit, states that "Mr. Harris and Mr. Martin demanded that their instructional leader, Principal Porche, be terminated; otherwise, they threatened they would revolt. Harris denied he indicated he would not participate. Superintendent Brezina considered their conduct disrespectful to the principal, himself and to the process of the campus improvement committee.

1. Context

This speech was made at the committee meeting. That speech was allegedly representing the views of other members of the faculty. As set out above, at the time of these events, there was no clearly established law that representational speech or speech on a committee is speech of public concern.

2. Content

The speech involved here was employment related and did not involve report of wrongdoing or corruption. The law was not clearly established in plaintiffs' favor. In fact, it was clearly established that the speech was not protected.

The case of *Wallace v. Texas Tech University*, 80 F.3d 1042 (5th Cir. 1996) was released just one month after the

VISD School Board voted to uphold the reassignment of plaintiffs. At that time the Fifth Circuit addressed the law of when employee speech was a matter of public concern. The court stated:

> But we have held that speech made in the role as employee is of public concern **only** in limited cases: those involving the report of corruption or wrongdoing to higher authorities. (emphasis added, citations omitted).

Id. 80 F.3d at 1050-51. Thus, the law that was clearly established at the time of the actions (and in fact until issuance of the Fifth Circuit panel decision in this case) was that speech made in the role of employee is *only* protected if it involved the report of corruption or wrongdoing to higher authorities. *See Wilson v. University of Texas Health Center*, 973 F.2d 1263, 1266 (5th Cir. 1992), *cert. denied*, 507 U.S. 1004, 113 S.Ct. 1644 (1993). It is uncontested that plaintiffs' speech did not involve any report of wrongdoing or corruption. Plaintiffs only complained of mismanagement and job performance. As stated clearly in the dissent, the majority has adopted a too expansive definition of protected speech for public employees. Justice Smith correctly noted that "This circuit has never before held that an employee's criticism of his immediate supervisor for mismanagement and job performance constitutes a matter of public concern." (App. at 19). Both the federal judge who granted summary judgment and Justice Smith, the dissenting Fifth Circuit justice, believe this speech was not protected speech. Furthermore, speech that demands a supervisor be fired and threatens revolt does not deserve First Amendment protection in the employment context. The content of the speech must be considered, but it was not.

3. Form

There were two forms of speech involved in the reassignment. The first is the verbal demands and threats at the committee meeting. The second was the nonverbal show of insubordination, disrespect and defiance by turning their chairs and backs to their supervisor (which Mr. Harris denies) and by folding arms, staring conspicuously out the window and refusing to participate further in the meeting. A third form was the letter distributed at the first of the year that attacked and belittled the principal. This did not result in adverse action, although it appears to be the same type of letter (or words) that justified termination of employment in *Connick v. Myers, supra.* This letter does set the stage and shows how the later speech amounts to the same type of mini-insurrection that justified termination in *Connick.*

B. The law was not clearly established.

To deny qualified immunity to the individual defendants the courts must find that it was so clearly established that their speech was a matter of public concern that these individuals could not reasonably have believed the transfers were lawful. *Anderson v. Creighton, supra.* This is clearly not the case.

1. Plaintiffs admit this is a new issue.

In plaintiffs' Request for Oral Argument, they admitted that this case presents factual issues of first impression. Obviously, then, the law could not be clearly established in the particularized fact specific sense required by this Court. This case conflicts with *Anderson v. Creighton, supra.*

2. The Fifth Circuit panel admits not addressing the factual scenario before.

In its opinion, the Fifth Circuit panel stated, "Plaintiffs' speech does not fit neatly within any of the factual scenarios in which we have held speech involved a matter of public concern." (App. at 10). This as much as admits that the law was not so clearly established that any reasonable official would know the transfers violated clearly established law.

3. The Fifth Circuit cited cases decided after the transfer as "clearly established" law.

In its very brief discussion of qualified immunity, the panel stated "The law is clearly established that a 'mix of public and private speech' may be constitutionally protected." *Benningfield v. City of Houston*, 157 F.3d 369 at 375 (5th Cir. 1998); *Warnock v. Pecos County, Texas*, 116 F.3d 776, 782 (5th Cir. 1997) ("a public employee can make a single statement both as an employee and as a citizen.").

This glaring error is that the superintendent and board in January of 1996 could not have known of cases that were not decided until 1997 and 1998. The courts are to evaluate whether the law was clearly established at the time of the action taken, not at the time the appeal is released. As in *Wilson v. Layne*, 119 U.S. 1642 (1999), these public officials "cannot have been 'expected to predict the future course of constitutional law'. *Procunier v. Navarette*, 434 U.S. 555, 562 (1978). *See also Wood v. Strickland*, 420 U.S. 308, 321 (1975); *Pierson v. Ray*, 386 U.S. 547, 557 (1967)." *Wilson* at 1701.

4. The clearly established law was that only employee speech reporting corruption or wrongdoing was of public concern.

As previously mentioned, the *Wallace* case decided one month after the reassignments clearly shows the state of the law at that time. It held that "speech made in the role as employee is of public concern only in limited cases: those involving the report of corruption or wrongdoing to higher authorities." *Wallace* at 1050-51. The post-action cases cited do not change that law. *Benningfield* involved reports of discrimination and *Warnock* involved reporting of official misconduct. App. at 22. As Justice Smith said in his dissent:

> This circuit has never before held that an employee's criticism of his immediate supervisor for mismanagement and job performance constitutes a matter of public concern. In fact, we consistently have refused to extend First Amendment protection to a public employee speaking in his role as an employee unless the speech involves the report of corruption or serious wrongdoing."

Smith dissent App. at 19.

As discussed by the dissent, the plaintiffs' speech related to questions of school management and budgetary allocations. Almost all of their comments concerned the ability of their direct supervisor to lead the faculty and administer the school.

The dissent also agreed with the district court, which found that there is little support for the plaintiffs' argument that the speech was in the context of a larger public debate. The single newspaper article did not raise any of plaintiffs' concerns about management, but only reported on low rating of the school. The district court "found no

other evidence of widespread public debate other than inconclusive private communications between individual faculty members and the board of trustees." Smith dissent App. at 21.

Justice Smith agreed with the district court that "when reviewed together, the content, form and context of the plaintiffs' speech do not sufficiently involve a matter of public concern to the degree required to receive First Amendment protection." App. at 22. Justice Smith then notes that the majority departs from its prior precedent limiting the notion of public concern to cases of serious wrongdoing and "unwisely expands the notion of public concern to include disputes between employees and their supervisors." App. at 22-23.

It cannot be seriously argued that the law was clearly established in January of 1996 so that any reasonable official would know the proposed transfer was protected as a matter of public concern. The Fifth Circuit decision eviscerates the qualified immunity defense for public officials.

5. Reasonable minds (including the judges) differ, thus this decision conflicts with well-established Supreme Court authority.

Four judges have reviewed this case. Two believe the speech was not protected (Judge Rainey in granting summary judgment and Justice Smith in his dissenting opinion). The two panel justices believe the speech was protected. The Supreme Court stated in May of this year that "If judges thus disagree on a constitution question it is unfair to subject [public officials] to money damages for picking the losing side of the controversy." *Wilson* at

1701. In the case at bar, the Fifth Circuit clearly conflicts with *Layne*, as well as *Malley v. Briggs, supra.*

Additionally, Mr. Martin in his deposition addressed whether the board violated his rights and stated "I can live with the fact that reasonable minds can disagree and they may have seen it differently from what I did. . . . " (App. at 68).

It is thus clear that reasonable officials (and even half the judges in this case) can disagree on whether this speech was protected, thus the individuals must be granted qualified immunity. *Malley v. Briggs, supra.*

V. The potential disruptiveness of the speech outweighs whatever First Amendment value it may have had resulting in precedent that hamstrings governmental officials and conflicts with *Connick v. Myers* and *Pickering v. Board of Education.*

It is uncontested that the speech at issue involved demands that the principal be removed or the faculty would revolt. The superintendent believed the demands of Martin and Harris served to disrupt the learning environment, undermine the authority of those responsible for implementation of the plan and hinder the close working relationships that were necessary in order for the plan to work. (App. at 45, 52 & 56).

Under the *Connick* test, this speech is unprotected. Even if it was speech on a matter of public concern – which all defendants deny – the potential disruptiveness of the speech was enough to outweigh whatever First Amendment value it might have had. In *Waters v. Churchill*, 511 U.S. 661 (1994), the speech was discouraging people from working in a department, unkind and inappropriate negative comments about a supervisor and

comments that it wasn't possible to wipe the slate clean between her and her supervisor. The court held that "[A]s a matter of law, this potential disruptiveness was enough to outweigh whatever First Amendment value the speech might have had." *Waters* at 681.

This Court in *Waters* held that substantial weight must be given to the disruptive impact and the reasonable prediction of disruption of the speech. *Waters*, 511 U.S. at 673.

The speech in this case similarly was that there was no way the speakers and/or faculty would support the principal and that if the principal wasn't removed they would revolt. It is hard to imagine speech that is more potentially disruptive. If such speech is protected, and their decision is allowed to stand, employees could band together and revolt against their supervisors, demanding their ouster with impunity. Government employment would be chaos. Supervisors would have little or no control over rebellious employees. Just as in *Waters*, this potential disruptiveness is enough to outweigh whatever First Amendment value the speech may have had as a matter of law. This Court should grant this Petition because it has so far departed from the accepted course of judicial proceedings that it will deprive governmental officials of power to manage employees.

VI. The Court's refusal to grant immunity conflicts with the Ninth Circuit's decision in *Moran v. State of Washington* and the eight other circuits cited therein which hold that the law is rarely if ever sufficiently "clearly established" to preclude qualified immunity when the context-intensive, case-by-case *Pickering* balancing analysis is required.

As to the individuals' qualified immunity, the Court is faced with the simple task of deciding whether or not the law "clearly" protected plaintiffs' right to demand removal of their supervisor and threaten faculty revolt. It goes almost without saying that it did not. In order to defeat the individuals' assertion of qualified immunity, plaintiffs' right to such speech must be so "clearly established" – that is, that the *Pickering* balance so clearly weighed in their favor – that the individual defendants could not have "reasonably believed" that the school district's interests in promoting the efficient running of the high school and avoiding disruption were sufficient to justify the reassignments to different campuses. *Anderson, supra.* Plaintiffs cannot discharge that burden.

This court has recognized that, in conducting the *Pickering* balance, courts must grant public employers "wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch." *Connick,* 461 U.S. at 151 (quoting *Arnett v. Kennedy,* 416 U.S. 134, 168 (1974) (Powell, J., concurring)). The case at bar conflicts with the Ninth Circuit case of *Moran v. State of Washington,* 147 F.3d 839 (4th Cir. 1998), which succinctly analyzes qualified immunity as follows:

> Because the underlying determination pursuant to *Pickering* whether a public employee's speech

> is constitutionally protected turns on a context-intensive, case-by-case balancing analysis, the law regarding such claims will rarely, if ever, be sufficiently "clearly established" to preclude qualified immunity under *Harlow* and its progeny. We are certainly not the first to recognize this self-evident tenet of qualified immunity jurisprudence. Indeed, this court has itself acknowledged, in a slightly different context, the difficulty of divining clearly established legal principles from multi-factor balancing tests . . . and today we join the chorus of voices from other circuits that have specifically observed the difficulty of finding clearly established law under *Pickering*.

(Citing cases from the Eighth, Fourth, First, Sixth, Tenth, Eleventh, Fifth and Seventh Circuits).

The Fifth Circuit's refusal to grant qualified immunity or even perform the *Pickering* balancing test to consider potential disruptive effects conflicts with this court's decision in *Waters v. Churchill*, the Ninth Circuit *Moran* opinion and the eight other circuit courts' opinions cited in *Moran*. This Court should grant this writ of certiorari to clear these conflicts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROGER D. HEPWORTH
Counsel of Record
HENSLEE, FOWLER, HEPWORTH & SCHWARTZ, L.L.P.
800 Frost Bank Plaza
816 Congress Avenue
Austin, Texas 78701
(512) 708-1804

Attorneys for Petitioners Kornfuehrer, Cain Green, Pollard and Brezina, in their individual capacities

ARTURO G. MICHEL
PHILIP D. FRAISSINET
BRACEWELL & PATTERSON, L.L.P.
711 Louisiana Street, Suite 2900
Houston, Texas 77002-2781
(713) 223-2900
Attorneys for Victoria Independent School District and all Petitioners in their official capacities

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 97-41015

Dwight HARRIS; Gene Martin,

Plaintiffs - Appellants,

VERSUS

VICTORIA INDEPENDENT SCHOOL DISTRICT; PAUL KORNFUEHRER, in his official and individual capacities; Clay Cain, in his official and individual capacities; IVAN GREEN, in his official and individual capacities; RANDY POLLARD, in his official and individual capacities; MARGARET EASLEY, in her official capacity only; REUBAN MURRAY, in his official capacity only; THERESA GUITIERREZ, in her official capacity only; ROBERT P BREZINA, in his official and individual capacities,

Defendants - Appellees.

Appeal from the United States District Court
for the Southern District of Texas

(Filed Mar. 04, 1999)

Before SMITH, DUHÉ and WIENER, Circuit Judges.

JOHN M. DUHÉ, JR., Circuit Judge:

This appeal arises from the reprimand and transfer of two teachers at Victoria High School ("VHS"), Dwight Harris and Gene Martin (collectively "Plaintiffs"), as a

result of their speech at a December 8, 1995 committee meeting. Robert Brezina, Superintendent of the Victoria Independent School District ("VISD"), reprimanded the Plaintiffs and transferred them to different campuses during the 1994-95 school year because of their speech. After the VISD Board of Trustees affirmed Superintendent Brezina's decision, the Plaintiffs sued Brezina, members of the Board[1], and VISD (collectively "Defendants"), alleging that they were transferred and reprimanded in violation of their First Amendment rights. The district court granted the Defendants' Motion For Summary Judgment on the ground that the Plaintiffs did not speak on a matter of public concern, and the Plaintiffs appealed. Because we hold that the Plaintiffs engaged in protected speech, the Defendants are not entitled to qualified or absolute immunity, and the Board of Trustees' actions were pursuant to official policy, we reverse and remand for further proceedings.

BACKGROUND

In the beginning of the 1995-96 school year, there was an escalating conflict at VHS concerning the performance rating of the school and its principal, Melissa Porche. At the same time, Harris and Martin's colleagues elected them faculty representatives of VHS's site based decision-making committee ("SBDM"). The SBDM is part of a program created by the Texas Legislature to improve the quality of public schools through increased input from

---

[1] The Board of Trustees Defendants are Paul Kornfuehrer, Clay Cain, Ivan Green, Randy Pollard, Margaret Easley, Reuban Murray, and Theresa Guitierrez.

multiple sources.[2] Each SBDM includes faculty representatives, parents, community members and business representatives.

In the fall semester, Harris and Martin met with Brezina and expressed the faculty's concerns about Principal Porche and gave Brezina a memorandum outlining them. As a result of this meeting, Superintendent Brezina hired a consultant to work with the SBDM, the faculty and Porche to improve the situation. After Brezina received the consultant's report, he formed a sub-committee of the SBDM to create an improvement plan for VHS. Brezina appointed all of the faculty members who were SBDM members, including Harris and Martin, to serve on this newly formed Internal Component Committee ("ICC").

The ICC distributed its improvement plan in Mid-October, but by the December 8, 1995 meeting of the ICC the situation at VHS had not improved. Part of the December 8th meeting was set aside to discuss the implementation of the improvement plan and its progress. Harris reported that many of the faculty members felt Porche was not following the plan, and that VHS needed a new principal to improve the situation. Martin agreed and added if Brezina did not do something, the faculty would revolt. Martin and Harris also called individual VISD Trustees relaying the same message.

After the December 8th meeting, Brezina reprimanded both Plaintiffs and transferred Harris to another high school to teach the same subjects and Martin to a

---

[2] *See* Tex. Educ. Code Ann. § 11.253 (Vernon 1996).

guidance center to teach new subjects to middle school students. The VISD Board of Trustees affirmed Brezina's decision in a grievance hearing.

After the Board's affirmance, the Plaintiffs sued, alleging the transfers were in retaliation for their exercise of protected speech. The district court granted the Defendants' Motion For Summary Judgment ruling that while the Plaintiffs' transfer was an adverse employment decision, they had not spoken on a matter of public concern. The Plaintiffs appealed.

DISCUSSION

I. First Amendment Claim

The Plaintiffs contend their speech was on a matter of public concern. The Defendants argue the Plaintiffs' speech was not on a matter of public concern, and alternatively, that the Plaintiffs did not suffer an adverse employment decision.

This court reviews the district court's determination de novo. *See La. Bricklayers & Trowel Trades Pension & Welfare Fund v. Alfred Miller General Masonry Contracting Co.*, 157 F.3d 404, 407 (5th Cir. 1998); *see also Willis v. Roche Biomedical Laboratories, Inc.*, 61 F.3d 313, 315 (5th Cir. 1995). We must determine whether the pleadings and other summary judgment evidence demonstrate there is no genuine issue as to any material fact, and whether the Defendants are entitled to judgment as a matter of law. *Id.* at 1371. The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *See Victor v. McElveen*, 150

F.3d 451, 454 (5th Cir. 1998) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

The government may not constitutionally compel persons to relinquish their First Amendment rights as a condition of public employment. *E.g., Keyishian v. Board of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589 (1967). The Plaintiffs must satisfy four elements to recover for a First Amendment retaliation claim. First, the Plaintiffs must suffer an adverse employment decision. *See Harrington v. Harris*, 118 F.3d 359, 365 (5th Cir. 1997). Second, the Plaintiffs' speech must involve a matter of public concern. *See Thompson v. City of Starkville*, 901 F.2d 456, 460 (5th Cir. 1990) (citing *Connick v. Myers*, 461 U.S. 138, 147 (1983)). Third, the Plaintiffs' interest in commenting on matters of public concern must outweigh the Defendants' interest in promoting efficiency. *Id.* (citing *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968)). Fourth, the Plaintiffs' speech must have motivated the Defendants' action. *Id.* (citing *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 287 (1977)). Because it is undisputed that Plaintiffs' transfers and reprimands were motivated by the Plaintiffs' speech at the December 8th meeting, we address only the first three requirements specifically.[3]

---

[3] Superintendent Brezina's testimony that he transferred the Plaintiffs because of their conduct at the December 8th meeting is undisputed.

A. Did the Plaintiffs suffer an adverse employment action?

Superintendent Brezina, in mid-term, transferred Harris to another high school to teach the same subjects and Martin to an alternative learning center for disruptive students to teach subjects and grade levels he had not taught before. Additionally, Brezina reprimanded the Plaintiffs in their transfer letters, and included the letters in the Plaintiffs' personnel files.[4] Subsequently, the Board of Trustees affirmed Brezina's actions in a grievance hearing.

The district court held that these facts constituted an adverse employment decision, and we agree. We recognize that federal courts should be extremely hesitant "to invade and take over" in the area of education; a federal court is not the appropriate forum in which to seek redress over "faculty disputes concerning teaching assignments, room assignments, administrative duties, classroom equipment, teacher recognition, and a host of other relatively trivial matters." *Dorsett v. Board of Trustees for State Colleges & Universities*, 940 F.2d 121, 123-24 (5th Cir. 1990) (citing *Connick v. Myers*, 461 U.S. 138, 138-39

---

[4] Superintendent Brezina's January 8, 1995 letters to Harris and Martin stated:

> [r]ecent events, statements and other conduct on your part have led me to the conclusion that you are unable and/or unwilling to maintain the commitment you made to these goals and to the improvement process. It is apparent to me that neither the team nor I will be able to bring about a resolution that will satisfy you and remove or alleviate your discontent.

(1983)). However, we have repeatedly held that reprimands and demotions constitute adverse employment decisions. *See Benningfield v. City of Houston*, 157 F.3d 369, 377 (5th Cir. 1998) (noting that a formal reprimand constitutes an adverse employment decision); *Harrington*, 118 F.3d at 365 ("Adverse employment actions are discharges, demotions, refusals to hire, refusals to promote, and reprimands.") (citing *Pierce v. Texas Dep't of Crim. Justice Inst. Div.*, 37 F.3d 1146, 1149 (5th Cir. 1994)).

We also recognize that "a plaintiff's subjective perception that a demotion has occurred is not enough" to constitute an adverse employment decision. *Forsyth v. City of Dallas*, 91 F.3d 769, 774 (5th Cir. 1996). However, the record reflects that the Plaintiffs' transfers, viewed objectively, constitute a demotion.[5] Superintendent Brezina testified that he intended the transfers to be disciplinary in nature, and that he merely reprimanded another faculty member because her actions were not as serious as the Plaintiffs.[6] Additionally, both Brezina and Board of Trustees member Gutierrez testified that they could not recall a mid-term involuntary transfer of a teacher at VHS, except in one instance which resulted

---

[5] We have also recognized that a transfer not involving a reduction in pay may constitute an adverse employment decision. *See Forsyth v. City of Dallas*, 91 F.3d 769, 774 (5th Cir. 1996); *Vojvodich v. Lopez*, 48 F.3d 879 (5th Cir. 1995); *Thompkins v. Vickers*, 26 F.3d 603, 610-611 (5th Cir. 1994); *Click v. Copeland*, 970 F.2d 106, 109 (5th Cir. 1992); *Fyfe v. Curlee*, 902 F.2d 401 (5th Cir. 1990).

[6] Superintendent Brezina reprimanded Janice Plowman, another faulty [sic] member on the ICC, because she attended a meeting of VHS teachers at a mall concerning Principal Porche.

from a reduction in force order.[7] Gutierrez further testified that the transfers branded the Plaintiffs as "troublemakers" and "not team players." Taken together, we agree with the district court that these reprimands and transfers constitute an adverse employment decision.

B. Was the Plaintiffs' speech on a matter of public concern?

"In order for speech by a public employee to enjoy constitutional protection from retaliation by a public employer, the speech must involve a matter of public concern." *Denton v. Morgan*, 136 F.3d 1038, 1042 (5th Cir. 1998) (citing *Connick v. Myers*, 461 U.S. 138, 147 (1983)). To rise to the level of public concern, the Plaintiffs' must speak primarily in their roles as citizens rather than as employees addressing matters only of personal concern. *See id.* (internal citations omitted). We look to the content, form, and context of the speech, as revealed by the whole record, in determining whether the Plaintiffs' speech addresses a matter of public concern. *See Connick*, 461 U.S. at 147-48; *see also Benningfield*, 157 F.3d at 375. Determining whether speech meets this threshold is a fact specific analysis. *See Thompson*, 901 F.2d at 461-62. Examining the Plaintiffs' speech in light of the above considerations, we hold that the Plaintiffs' speech was on a matter of public concern.

---

[7] This case does not involve a mere administrative change in teaching assignments, but a mid-term transfer to an entirely different school, and in Martin's case, unfamiliar subjects and grade levels.

Brezina testified that he transferred and reprimanded the Plaintiffs as a result of their speech and actions at the December 8th ICC meeting. The Plaintiffs alleged at this meeting they told Brezina that many of the faculty believed Principal Porche was not following the improvement plan, that her replacement was necessary to alleviate the problems, and that the faculty would revolt if Brezina did not do something.[8]

The Plaintiffs emphasize that the context and form of their speech indicate it was on a matter of public concern. They contend that they spoke at the meeting as elected representatives of the faculty, and that they simply communicated the views of the faculty to the administration in compliance with their duties as committee members. The Plaintiffs point out that the stated purpose of the ICC's meeting was to check the progress of implementing the improvement plan. They argue that when they gave feedback as requested, Brezina punished them because he did not like their message.

The Defendants argue the Plaintiffs spoke only in their role as employees, and that their speech was mere criticism of their immediate supervisor's administration of the school. The Defendants interpret our cases as holding that when a public employee speaks in his role as an employee, his speech may only be considered on a matter of public concern if it involves the report of corruption or

---

[8] Brezina testified in his deposition that the Plaintiffs turned their chairs facing away from the Principle Porche at this meeting in an act of defiance and disrespect to both the Principal and himself, but the Plaintiffs specifically denied these actions.

wrongdoing to higher authorities. They argue that because the Plaintiffs' speech does not fall within that limited exception, their speech is not on a matter of public concern.

The Plaintiffs' speech does not fit neatly within any of the factual scenarios in which we have held speech involved a matter of public concern. The Plaintiffs rely on cases where we have held that an employee's testimony before a fact-finding or adjudicatory body is inherently a matter of public concern. *See Johnston v. Harris County Flood Control District*, 869 F.2d 1565, 1577 (5th Cir. 1989); *Reeves v. Claiborne County Bd. Of Educ.*, 828 F.2d 1096, 1100 (5th Cir. 1987).[9] While the Plaintiffs were not faced with the choice of perjuring themselves or losing their job, they were faced with the choice of either telling the truth and fulfilling their duty as committee members or keeping silent and frustrating their purpose and function on the committee. *See Victor v. McElveen*, 150 F.3d 451, 458 (5th Cir. 1998) ("[W]hen an employee speaks in response to an invitation and on a matter pertinent to that request, the context factor weighs in his favor.") By protecting the Plaintiffs' speech when the administration requested them, as committee members, to speak truthfully on the school's progress, we are protecting "the integrity of the truth seeking process." *See Green*, 105 F.3d 882, 886 (3rd Cir. 1997).[10]

---

[9] *Accord Green v. Philadelphia Housing Authority*, 105 F.3d 882, 886 (3rd Cir. 1997) (holding that employee's voluntary testimony is also inherently a matter of public concern).

[10] The outcome of this fact specific determination might have been different had the Plaintiffs not been committee

An employee's speech may contain an element of personal interest and yet still qualify as speech on a matter of public concern. *See Benningfield*, 157 F.3d at 375; *see also Thompson*, 901 F.2d at 463-65. The Plaintiffs certainly had an interest in their speech as employees, because they could not help but benefit as teachers from the improvement of the educational environment at VHS. However, they also had strong interests as committee members in achieving the goals the committee set for itself and the school. The Defendants did not point to any evidence of an underlying personal dispute between the Plaintiffs and Principle Porche. There is no evidence that the Plaintiffs' speech merely concerned an employment related squabble with their supervisor. In fact, there is evidence to the contrary, establishing that both Plaintiffs were constantly involved in attempts to raise the level of education at VHS.

Another factor considered in determining whether speech is on a matter of public concern is whether the comments were made against a backdrop of widespread debate in the community. *See Tompkins*, 26 F.3d 603, 607. Several board members testified that faculty members and parents called board members with concerns about VHS. Board of Trustees member Margaret Easley testified that people even stopped her at the grocery store and church with concerns about the situation at VHS. Additionally, the local newspaper ran a story indicating the low performance rating VHS received from the Texas

---

members reporting the views of the faculty at large to the administration.

Department of Education. In light of the above considerations, we hold that the Plaintiffs did speak on a matter of public concern and reverse the district court.

C. Pickering Balancing

We must next consider whether the Plaintiffs' interest in free speech outweighs "the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees." *Victor,* 150 F.3d at 457 (citing *Pickering,* 391 U.S. at 568) In striking this balance we should examine whether the speech was likely to generate controversy and disruption, impeded the school's general performance and operation, and affected working relationships necessary to the department's proper functioning. *See Brawner v. Richardson,* 855 F.2d 187, 192 (5th Cir. 1988) (citing *Pickering,* 391 U.S. at 569-73).

The Defendants argue that the Plaintiffs' speech demonstrated their lack of commitment to the improvement plan, therefore jeopardizing the plan's success. They assert Brezina was justified in removing the Plaintiffs from VHS's campus to allow the improvement plan to effectively resolve the problems on campus.

The Defendants do not offer any evidence that the Plaintiffs' speech disrupted the school's operations or performance. In fact, the improvement plan specifically designated that the content of the ICC meetings was to be confidential. The events on the campus after the Plaintiffs' transfer indicate that Brezina's conclusion was incorrect. Ultimately, both Brezina and Principal Porche

were removed from VHS's campus. The Plaintiffs' speech and actions throughout the turmoil at VHS indicate their intent to improve the situation at the school rather than abandon the goals of the committee and the improvement plan. For the above reasons, we strike the balance in favor of the plaintiffs' interest in free speech.

II. Immunity

A. Qualified Immunity

The Defendants argue as an alternative that their qualified immunity supports the district court's grant of summary judgment, even if Plaintiff's speech is protected and they did suffer an adverse employment decision. The district court did not reach the issue.

Qualified immunity shields certain public officials performing discretionary functions from civil damage liability if their actions could reasonably have been thought consistent with the rights they are alleged to have violated. *Duckett v. City of Cedar Park*, 950 F.2d 272, 279 (5th Cir. 1992) (citing *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)). Whether a defendant is entitled to qualified immunity is a two step inquiry. *See Hayter v. City of Mount Vernon*, 154 F.3d 269, 274 (5th Cir. 1998). The first question is whether the plaintiff alleged the violation of a clearly established constitutional right. *See Siegert v. Gilley*, 500 U.S. 226, 232 (1991). The second question is whether the defendant's conduct was objectively reasonable in light of clearly established constitutional law. *See Hayter*, 154 F.3d at 274. "Even if a defendant's conduct actually violates a plaintiff's constitutional right, the defendant is entitled to

qualified immunity if the conduct was objectively reasonable." *Duckett*, 950 F.2d at 280.

The Defendants contend they are entitled to qualified immunity because the law concerning the Plaintiffs' type of speech was not clearly established at the time of their conduct. They argue that a right can rarely be considered clearly established when the law requires the balancing of interests in determining whether the Plaintiffs' speech is constitutionally protected. *See Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992); *Borucki v. Ryan*, 827 F.2d 836, 848 (1st Cir. 1987). The Defendants assert they should not be punished for making an incorrect judgment call in this particular case. The Plaintiffs argue there does not have to be a case directly on point for the law to be deemed clearly established, and that existing employee speech law was clearly established under these facts. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("this is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful."); *see also Hassan v. Lubbock Indep. Sch. Dist.*, 55 F.3d 1075, 1079 (5th Cir. 1994).

The Defendants are not insulated from their unconstitutional conduct merely because a balancing test is involved in our analysis. While employee speech cases are a likely vehicle for varied fact scenarios, the law is clearly established that a "mix of public and private speech" may be constitutionally protected. *Benningfield*, 157 F.3d at 375; *Warnock v. Pecos County, Texas*, 116 F.3d 776, 782 (5th Cir. 1997) ("a public employee can make a single statement both as an employee and as a citizen.")

B. Absolute Immunity

Board of Trustees Defendants Cain, Kornfuehrer, Pollard and Green argue they are entitled to absolute immunity because their actions in the Level III Grievance Hearing reviewing the Plaintiffs' transfer were quasi-judicial in nature. For the following reasons, we hold that the Board Member Defendants are not entitled to absolute immunity.

"It is generally understood that a judge, and those similarly situated, have absolute immunity for judicial acts." *Mylett v. Mullican*, 992 F.2d 1347, 1352 (5th Cir. 1993). We examine the character of a governmental officer's duties and the relationship to the parties when determining whether he is entitled to absolute immunity. *Id.* (citing *Stump v. Sparkman*, 435 U.S. 349 (1978)). "If the functions are of a judicial nature then we must weigh the costs and benefits of denying or affording absolute immunity." *O'Neal v. Mississippi State Board of Nursing*, 113 F.3d 62, 65 (5th Cir. 1997). The following six factors are characteristics of the judicial process and are instructive in determining whether the Defendants are entitled to absolute immunity: (1) the need to assure that the individual can perform his functions without harassment or intimidation; (2) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (3) insulation from political influence; (4) the importance of precedent; (5) the adversarial nature of the process; and (6) the correctability of error on appeal. *See id.* (citing *Cleavinger v.*

Saxner, 474 U.S. 193, 202 (1985)). "No one factor is controlling and the list of considerations is not intended to be exclusive." *Mylett*, 992 F.2d at 1353.

The Defendants rely on *Hernandez v. Hayes*, 931 S.W.2d 648 (Tex.App. – San Antonio, 1996, writ denied), arguing that the Texas school board grievance procedures are quasi-judicial, therefore entitling the Board of Trustees Defendants to absolute immunity. *Hernandez* dealt with the *absolute privilege* under Texas law granted to a witness testifying in a quasi-judicial proceeding against civil liability for defamation. While the court held that the grievance procedures were quasi-judicial in nature, it analyzed the procedure using different factors from the federal rule. *See Hernandez*, 931 S.W.2d at 652.

The Plaintiff's rely on the Supreme Court's decision denying absolute immunity to school board members in *Wood v. Strickland*, 420 U.S. 308, 320 (1975). The Court held that affording absolute immunity to school board members was unwarranted "since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy" for constitutional violations. *Wood*, 420 U.S. at 320.

While *Wood* dealt with a school board's discipline of a student, at least one other circuit has extended this holding to deny absolute immunity to school boards' decisions concerning a faculty member's employment. *See Stewart v. Baldwin County Board of Education*, 908 F.2d 1499, 1507-08 (11th Cir. 1990) (holding the Court's ruling precludes an extension of absolute immunity to board

members' decision to terminate faculty member). Additionally, the record indicates that the school board members were elected, illustrating that they are not insulated from political forces as are appointed governmental officials.[11] While it is important that the school board members are able to make decisions "free from the threat of incurring personal liability for every decision they hand down", *O'Neal*, 113 F.3d at 66, we believe that qualified immunity affords them sufficient protection. For the above reasons, we hold the Defendants are not entitled to qualified immunity.

III. VISD's section 1983 liability

VISD alternatively contends the Plaintiffs failed to demonstrate that constitutional violations occurred as a result of school district policy or custom. The Plaintiffs argue VISD is subject to § 1983 liability through Superintendent Brezina's actions because the Board of Trustees delegated their policymaking authority in the area of employment policy to him. Alternatively, they contend VISD is subject to liability through the Board of Trustees' actions as policymakers in affirming the Plaintiffs' transfers in the grievance hearing.

"A municipality may be held liable under § 1983 when 'execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury.' " *Doe v. Dallas Indep. Sch. Dist.*, 153

---

[11] The parties failed to apply the above factors or specify any of the school board's procedures in their briefs.

F.3d 211, 215 (5th Cir. 1998) (citing *Monell v. Dep't of Soc. Services of New York*, 436 U.S. 658, 691 (1978)). On at least two separate occasions, we have held that the board of trustees of an independent school district in Texas is a policymaker for purposes of § 1983. *See Doe*, 153 F.3d at 216; *Jett v. Dallas Indep. Sch. Dist.*, 7 F.3d 1241, 1245 (5th Cir. 1993). The Board of Trustees' action in affirming Superintendent Brezina's decision to transfer the Plaintiffs was an act that "may fairly be said to represent official policy" because of the Board's status as a policymaker. *Doe*, 153 F.2d at 215. As a result, VISD's argument fails.

CONCLUSION

For the foregoing reasons, we reverse the district court's grant of summary judgment for the Defendants and remand to the trial court for further proceedings.

REVERSED AND **REMANDED**

JERRY E. SMITH, Circuit Judge, dissenting:

Federal courts have "neither the competency nor the resources to undertake to micro-manage the administration of thousands of state educational institutions." *Dorsett v. Bd. of Trustees*, 940 F.2d 121, 123-24 (5th Cir. 1991). Because the majority adopts too expansive a definition of protected speech for public employees – and thereby

takes another step toward constitutionalizing the management of public schools – I respectfully dissent.

I.

I disagree with the majority's characterization of the plaintiffs's speech "as a matter of public concern." When analyzing this question, a court should consider the "content, form and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147-48 (1983). While determinations of whether speech is a matter of public concern are necessarily fact-specific, the majority nonetheless departs from this circuit's precedent. In particular, the majority fails properly to analyze the *content* of the plaintiffs' speech and, in doing so, lowers the requirements for plaintiffs asserting similar causes of action.

A.

This circuit has never before held that an employee's criticism of his immediate supervisor for mismanagement and job performance constitutes a matter of public concern. In fact, we consistently have refused to extend First Amendment protection to a public employee speaking in his role as an employee unless the speech "involves the report of corruption or serious wrongdoing."[1] The cited

---

[1] *Wallace v. Texas Tech. Univ.*, 80 F.3d 1042, 1050-51 (5th Cir. 1996) (holding that speech about financial assistance and handling racial discrimination does not qualify as protected speech); *see also Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794 (5th Cir. 1989) (reasoning that teacher's choice of

cases teach us that we should analyze the content of an employee's speech about his supervisor for discussion of "serious wrongdoing." This may include claims of sexual harassment or racial discrimination, for example, but should be more than simply criticisms of a supervisor's job performance or management skills.

The plaintiffs seek protection for their speech at the December 8, 1995, meeting related to questions of school management and budgetary allocations. More specifically, almost all their comments returned to the question of the ability of their direct supervisor, Porche, to lead the faculty and administer the school.

These facts distinguish this case from Tompkins, the most analogous fact situation cited by the plaintiffs. Here, the plaintiffs were discussing the management of their own school, whereas Tompkins had been criticizing the cancellation of a program at another school. Thus, the instant plaintiffs have a much greater personal stake in the consequences of their speech.

Additionally, Tompkins had alleged that the art program had been canceled for reasons of racial discrimination on the part of his superintendent; this obviously is a

---

curriculum does not qualify as "matter of public concern"); *cf. Wilson v. UT Health Ctr.*, 973 F.2d 1263, 1266 (finding speech alleging sexual harassment a matter of public concern); *Thompson v. Vickers*, 26 F.3d 603, 606 (5th Cir. 1994) (finding speech alleging racial discrimination a matter of public concern); *Benningfield v. City of Houston*, 157 F.3d 369, 375 (5th Cir. 1998) (finding speech alleging hostile work environment and tampering with criminal histories a matter of public concern).

higher level of wrongdoing than is alleged here. Moreover, while the plaintiffs' December 8 speech was not in relation to a threat of transfer or termination, it nonetheless focused exclusively on their direct supervisor's role in the administration of the school and resembles an employment dispute more than does Tompkins's general statement about school policy. In sum, the district court correctly followed this circuit's precedent in holding that the content of the plaintiffs' speech at the December 8 meeting does not rise to the level of "serious wrongdoing" that this court has required.

B.

The majority also relies on the "backdrop of widespread debate in the community." But the district court found that there is little support for the plaintiffs' argument that their criticisms of Porche had been made in the context of a larger public debate over Porche's management of the high school. For instance, the court found that the single newspaper article offered by the plaintiffs did not raise any of the plaintiffs' concerns about the management of the school or of its principal. It found no other evidence of widespread public debate other than inconclusive private communications between individual faculty members and the board of trustees. Therefore, the court properly refused to find that the plaintiffs' comments were made "in the context of a continuing commentary that had originated in [a] public forum." Tompkins, 26 F.3d at 607 (quoting *Brawner v. City of Richardson*, 855 F.2d 187, 192 (5th Cir. 1988)).

II.

I agree with the district court that when reviewed together, the content, form, and context of the plaintiffs' speech do not sufficiently involve a matter of public concern to the degree required to receive First Amendment protection. The form of the speech does not by itself establish that it involved a matter of public concern.[2] Moreover, the plaintiffs have offered little evidence to support their argument that there was widespread public debate on the matter. Most importantly, however, the content of the speech seems narrowly focused on the performance and conduct of their direct supervisor. Without alleging seriously wrong or corrupt conduct, the plaintiffs have little basis for claiming First Amendment protection.

The Supreme Court created the "public concern" requirement to prevent "intrusive oversight by the judiciary in the name of the First Amendment." *See Connick*, 461 U.S. at 147-48. Previously, this court has followed these instructions by limiting the notion of public concern to cases of serious wrongdoing, so as to dissuade litigants from using federal courts to settle employment and management disputes. The majority departs from this approach and unwisely expands the notion of public

---

[2] While I do not disagree with the majority's conclusion that the form of the plaintiffs' speech weighs in their favor, the fact that they were invited to speak does not necessarily create a "matter of public concern." The other two factors – especially the content of the speech – are key to determining that the speech was not a matter of public concern.

concern to include disputes between employees and their supervisors. Accordingly, I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

DWIGHT HARRIS and GENE MARTIN,	§	
Plaintiffs,	§	CIVIL ACTION
v.	§	NO. V-96-051
VICTORIA INDEPENDENT SCHOOL DISTRICT, et al.,	§	
Defendants.	§	

ORDER

(Filed Jul. 30, 1997)

Before the Court are Defendants' motions for summary judgment and the motion to dismiss and for sanctions of Defendants Clay Cain, Ivan Green, Paul Kornfuehrer, and Randy Pollard. Having reviewed the entire record and the applicable law, it appears that Plaintiffs did not speak on matters of public concern. Therefore, Defendants' motion to dismiss and for sanctions (Dkt. #32) will be DENIED, and Defendants' motions for summary judgment (Dkts. #30,31) must be GRANTED.

BACKGROUND

Plaintiffs Dwight Harris ("Harris") and Gene Martin ("Martin") worked as teachers at Victoria High School ("VHS") until they were transferred from those positions by the Superintendent for the Victoria Independent School District ("VISD"), Defendant Robert Brezina

("Brezina"). Melissa Porche ("Porche") was the principal of VHS at all times relevant to this litigation. Defendants Clay Cain, Ivan Green, Paul Kornfuehrer, and Randy Pollard were members of the VISD Board of Trustees. These "Trustee Defendants" upheld Brezina's decision to transfer Plaintiffs.

The fall of 1995 marked the beginning of VHS's 1995-1996 school year. Harris and Martin were the faculty representatives of VHS's site based decision-making committee ("SBDC"), a committee formed pursuant to state law. *See, e.g.*, TEX. EDUC. CODE §§ 11.251(b)-(e); 11.253. The SBDC was a vehicle to provide faculty and community input into campus administrative decisions.

In the fall of 1995, a power struggle ensued between Porche and the VHS faculty. Several faculty members, including Harris and Martin, were dissatisfied with Porche's effectiveness as a principal. Harris and Martin relayed these concerns to Superintendent Brezina. To address these concerns, Brezina hired an organizational health consultant to work with the SBDC and Porche. With the help of this consultant, the SBDC issued an improvement plan to the faculty. Harris and Martin claim, however, that Porche refused to follow the improvement plan and continued in her malingering behavior. Specifically, Harris and Martin claim that (1) Porche delayed in issuing money to faculty departments for supplies and materials, and (2) Porche refused to follow through on a verbal commitment she made to change VHS's block scheduling system.

The SBDC met on December 8, 1995, in part to determine "how things were going." Prior to the meeting,

Harris conducted an informal polling of several faculty members to determine how they felt about Porche's performance. Harris and Martin reported to the SBDC the faculty's belief that things were not going well, and that the faculty "would revolt" if VHS did not replace Porche with a new principal. Harris and Martin's speech did not end with the SBDC meeting, however. At some point, Plaintiffs placed a two-page letter titled "Concerns at Victoria High School" in the school mailbox of every VHS faculty member. This letter claimed that Porche (1) created problems for scheduling, (2) overrode teacher decisions regarding registration and other issues, (3) had "no respect for teachers", (4) was "a bully," (5) had poor decision-making skills, (6) was vindictive, and (7) did not consider the consequences of her decisions. The letter indicated that Porche should be fired, or at the very least must change her attitude towards the SBDC.

After these two actions, Brezina transferred Harris and Martin out of VHS and into different VISD schools. The evidence does not conclusively reveal whether Brezina decided to transfer Plaintiffs because of their statements to the SBDC, because of their distribution of the unsigned letter, or both. However, it appears that Brezina considered Plaintiffs' speech to be insubordinate, and that the speech had created needless tension between the faculty and Porche. Brezina transferred Harris to Stroman High School, apparently to teach the same subjects he had previously taught at VHS. Brezina transferred Martin to the Mitchell Guidance Center to teach new subjects to middle school students. Although neither Plaintiff suffered a loss in pay because of the transfers, both considered the transfers to be demotions.

Plaintiffs filed grievances about the transfers through VISD's grievance procedure, claiming they were transferred because they engaged in their First Amendment rights. Ultimately, Plaintiffs' grievances went before the VISD Board of Trustees. The Trustee Defendants supported Brezina's transfer and denied Plaintiffs' grievances.

Plaintiffs filed suit in this Court, claiming that Defendants retaliated against Plaintiffs because they engaged in constitutionally protected speech. They seek damages and reinstatement.

ANALYSIS

"To establish a § 1983 claim of retaliation for the exercise [of] free speech, Plaintiffs must prove that: (1) Defendants were acting under color of state law; (2) Plaintiffs' speech activities were protected under the First Amendment; and (3) Plaintiffs' exercise of their protected right was a substantial or motivating factor in Defendants' actions." *Harrington v. Harris*, ___ F.3d ___, ___, 1997 WL 405906, at *5 (5th Cir. July 21, 1997). To state a cognizable retaliation claim, Plaintiffs must allege facts demonstrating that their speech involved a matter of public concern, and that they "suffered an adverse employment action for exercising [their] right to free speech." *Id.* (quoting *Pierce v. Texas Dep't of Crim. Justice*, 37 F.3d 1146, 1149 (5th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1957 (1995)). Further, Plaintiffs have the initial burden of establishing that their protected speech was a "substantial" or "motivating" factor in the decision to transfer them to new positions. *Mt. Healthy City School*

Dist. v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 576 (1977); *Fyfe v. Curlee*, 902 F.2d 401, 403 (5th Cir.), *cert. denied*, 498 U.S. 940, 111 S.Ct. 346 (1990).

There is no real dispute that Brezina transferred Plaintiffs because of their speech, although the parties cannot agree which speech resulted in Brezina's decision. This dispute is a non-issue, because both types of speech focused on internal matters relating to Porche. Therefore, the Court will focus on whether the First Amendment protects Plaintiffs' speech as a whole.

Adverse Employment Decision

First, the Court must determine whether Brezina's decision to transfer Plaintiffs was an "adverse employment decision." Defendants note that Brezina transferred both Plaintiffs to positions within VISD, that neither Plaintiff suffered a reduction in pay, and that neither Plaintiff was threatened with discharge or was denied a promotion or pay increase. Defendants attempt to cast Brezina's transfers as a change in "teaching assignments," which the Fifth Circuit has found to be non-actionable under Section 1983:

> Adverse employment actions are discharges, demotions, refusals to hire, refusals to promote, and reprimands. Many actions which merely have a chilling effect upon protected speech are not actionable. Actions such as "decisions concerning *teaching assignments*, pay increases, administrative matters, and departmental procedures," while extremely important to the person who has dedicated his life to teaching, do

> not rise to the level of a constitutional deprivation.

Harrington, ___ F.3d at ___, 1997 WL 405906, at *5 (emphasis added). However, transfers can be "demotions" that are actionable under Section 1983, even if there is no reduction in salary as a result of the transfer. *Forsyth v. City of Dallas*, 91 F.3d 769, 774 (5th Cir. 1996) (transfers from prestigious intelligence unit to night patrol were "demotions" and constituted punishment actionable under § 1983), *cert. filed* 65 USLW 3826 (June 3, 1997); *Click v. Copeland*, 970 F.2d 106, 111 (5th Cir. 1992) (employee in sheriffs' office transferred to less prestigious, but equally well paying, position constituted an adverse employment decision); *Fyfe*, 902 F.2d at 404-405 (reassignment of secretary from demanding and enjoyable job to position where only duties were Xeroxing and laminating documents amounted to a constitutional deprivation); *Reeves v. Claiborne County Bd. of Educ.*, 828 F.2d 1096, 1100 (5th Cir. 1987) (affirming judgment in favor of school administrator who was transferred after testifying in case against school board); *Wagner v. Texas A&M Univ.*, 939 F. Supp. 1297, 1313-14 (S.D. Tex. 1996) (tenured professor removed from teaching neuroanatomy and reassigned to teaching microanatomy could be an adverse employment action).

In this case, both Plaintiffs viewed the mid-year transfers as punitive and humiliating. Both teachers were moved from their present teaching assignments to what they considered to be less desirable positions. Brezina transferred Harris from his teaching position at VHS and

moved him to a smaller campus. Brezina transferred Martin to a guidance center to teach younger students subjects Martin had never taught before. Because of the transfers, neither Plaintiff was able to represent the faculty on the SBDC. The Court concludes that the transfers were "demotions," and not mere changes in teaching assignments. Therefore, the transfers were actionable under Section 1983.

Speech on Matters of Public Concern

The Court now must decide whether Harris and Martin were speaking on matters of public concern when they criticized Porche, their superior. "The definition of 'matters of public concern' is imprecise." *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 798 (5th Cir. 1989), *cert. denied* 496 U.S. 926, 110 S.Ct. 2620 (1990). Whether speech is protected by the First Amendment is a question of law to be determined by the Court. *Dodds v. Childers*, 933 F.2d 271, 273 (5th Cir. 1991). The Court must consider the content, form and context of a given statement, as revealed by the whole record. *Connick v. Myers*, 461 U.S. 138, 147-48, 103 S.Ct. 1684, 1690-91 (1983). Issues do not rise to a level of "public concern" simply because the speaker is interested in the subject matter. Rather, the speech will be protected if the speaker conveys the words "in his *role as a citizen* and not in his *role as an employee* of the school district." *Kirkland*, 890 F.2d at 799 (original emphasis). In other words, a matter "not otherwise of public concern does not attain that status because its subject matter could, in different circumstances, have been the topic of a communication to the public that

might have been of general interest." *Connick*, 461 U.S. at 148 n.8. 103 S.Ct. at 1691 n.8.

Plaintiffs admit, as they must, that an employee's criticism of his superior or a statement that the supervisor needed to be removed typically does not rise to the level of protected speech. Further, there is little question that Plaintiffs were acting as employees, and not as citizens, when they complained about Porche's actions. Public employees who speak in their role as public employees rarely speak on matters of public concern:

> We have recognized that public employees may speak in their role as employees yet still speak on matters of public concern in limited instances. But we have held that speech made in the role as employee is of public concern only in limited cases: those involving the report of corruption or wrongdoing to higher authorities. There is no evidence (or even an allegation) that Wallace was a whistle blower or attempted to report any wrongdoing to the public or to higher authorities. Thus, Wallace failed to allege facts, much less present evidence, sufficient to constitute speech on a matter of public concern.

Wallace v. Texas Tech Univ., 80 F.3d 1042, 1050-51 (5th Cir. 1996) (citations omitted). Plaintiffs did not claim that Porche acted illegally or immorally. Plaintiffs, further, were not complaining about perceived discrimination. *Compare with Tompkins v. Vickers*, 26 F.3d 603 (5th Cir. 1994). Rather, Plaintiffs complained that Porche was a poor leader who mismanaged VHS. This is not the type of "wrongdoing" described in *Wallace*.

Plaintiffs argue that the faculty's problems with Porche became so severe that the issue had become a matter of public concern in Victoria. The record does not support Plaintiffs' arguments. Plaintiffs' criticisms of Porche were not made against a backdrop of public debate regarding the mismanagement of VISD. Rather, Plaintiffs' criticisms were evidence of an ongoing intra-governmental dispute. *See Terrell v. Univ. of Texas Sys. Police*, 792 F.2d 1360, 1363 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064, 107 S.Ct. 948 (1987). Plaintiffs rely on a newspaper article which reported that a state agency had rated VHS as "low performing." However, the article indicated that VHS received the poor designation because of a high drop out rate for certain categories of students. The article did not raise any concerns about Porche or the management of the school. Thus, even if the Court could rely on this article as evidence, the article would not support Plaintiffs' claim that Porche's performance had become a matter of public concern.

There was no other history of "widespread public debate" associated with Porche's management. *Compare with Pickering v. Bd. of Educ. of Township High Sch. Dist.*, 391 U.S. 563, 566, 88 S.Ct. 1731, 1733 (1968); *Tompkins*, 26 F.3d at 607. Two of the VISD Board Members were concerned about the low morale of faculty members; however, any connections between this low morale and the "low performance" rating is speculative at best, and it is the rating, and not the morale issue, that had become a matter of public debate. Although individual faculty members contacted individual board members to privately discuss their concerns, no teacher brought forward concerns about Porche to the Board as a whole until after

Brezina had transferred Plaintiffs. *Compare with Tompkins*, 26 F.3d at 607. Again, this is further evidence of an ongoing internal squabble, and does not further Plaintiffs' claim that their speech occurred amidst a backdrop of public debate. *See Dodds*, 933 F.2d at 274 ("The private form and context of speech, while not dispositive, are relevant factors in addressing whether that speech addresses a matter of public concern. Dodds did not address her complaints to anyone outside the College, nor did those complaints occur against a background of ongoing public debate about the administration of the College . . . "). Under the circumstances, the Court cannot conclude that Plaintiffs' criticism came "in the context of a continuing commentary that had originated in [a] public forum." *Tompkins*, 26 F.3d at 607 (quoting *Brawner v. City of Richardson*, 855 F.2d 187, 192 (5th Cir. 1988)).

Further, the record indicates that Plaintiffs were primarily motivated by their "personal concern about the work environment and teaching assignments." *Dorsett v. Bd. of Trustees*, 940 F.2d 121, 124 (5th Cir. 1991). Quite simply, Harris and Martin, and perhaps other faculty members, were dissatisfied with their treatment at the hands of Porche. However, "an employee cannot transform a personal conflict into an issue of public concern simply by arguing that individual concerns might have been of interest to the public under different circumstances." *Dodds*, 933 F.2d at 273. Harris and Martin imply that they spoke out of the interest of their students. However, their speech does not reveal such a concern. The "Concerns at Victoria High School" letter is a telling example of the types of speech Plaintiffs engaged in:

SCHEDULING – There have been many problems with scheduling this year. Mrs. Porche did not run the schedule early enough in order for the necessary corrections and changes to be made prior to students getting their schedules. . . . The guidance department had no input in scheduling. . . .

DECISION-MAKING – Mrs. Porche overrides teacher and counselor decisions. One example is the way registration was done. Also, special preference was given to kids in football. When some of the players were having trouble getting their schedules, Mark Reeves was able to get them when other parents were still waiting. . . . The counselors were not allowed to hand out schedules until corrections were done, yet they were under tremendous pressure to get them out. . . .

NO RESPECT FOR TEACHERS – At the first faculty meeting this year Mrs. Porche felt some teachers were not paying attention and referred to us as being "just like her class" and proceeded to chastise the entire group. Last year she paid no attention to the teachers on the Site Based Decision Committee when they brought concerns to her. . . .

SHE IS A BULLY – When a teacher expressed concerns and questions over the budget, she was called in and chewed out. The director of guidance was chewed out after he tried to explain to the faculty how registration would be done.

. . .

POOR DECISION MAKING SKILLS – There was an assembly on the first day of school. It was not announced until second block. I think Mrs. Porche forgot that it had been scheduled. . . .

VINDICTIVE – Several teachers who have disagreed with Mrs. Porche or questioned her decisions had been assigned classes they did not desire.

DOES NOT CONSIDER CONSEQUENCES OF DECISIONS – Examples are teaching assignments, delay in preparing master schedule, first day assembly, and scheduling.

Plaintiffs admit that some of these issues, such as block scheduling, were discussed "within the VHS community." However, Plaintiffs fail to present evidence of the backdrop of "widespread public debate." Plaintiffs' SBDC speech reveals similar, intra-governmental concerns. Harris and Martin reported that teachers were unhappy with Porche's actions as principal. Plaintiffs also complained that budgets were not properly funded, and that Porche did not allow sufficient faculty input. These issues were not matters of public concern, but instead were attacks upon Porche's ministerial duties and management style. *See Moore v. Mississippi Valley State Univ.*, 871 F.2d 545, 551 (5th Cir. 1989) (charges of favoritism by supervisor and laxity of enforcing rules were not matters of public concern).

Finally, Plaintiffs argue that VISD created a public forum when it solicited Plaintiffs' views, and that Plaintiffs should not be retaliated against for providing the views they requested. On balance, the context in which Plaintiffs made their speech does not outweigh the speech itself. Plaintiffs were not providing facts to an adjudicatory body; they did not face the Hobson's choice of retaining their jobs or committing perjury. *Compare with Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1576-78 (5th Cir. 1989), *cert. denied*, 493 U.S. 1019,

110 S.Ct. 718 (1990) (speech of supervisor testifying under oath at Equal Employment Opportunity hearing was protected by First Amendment); *Reeves*, 828 F.2d at 1100 (sworn trial testimony about operations of public school was protected by First Amendment). Therefore, Plaintiffs' speech was not "inherently a matter of public concern." *Johnston*, 869 F.2d at 1577. Compared with Johnston and Reeves, Plaintiffs could have controlled the type of issues they discussed and the manner in which they presented them:

> The real issue after *Johnston* and *Reeves* is control. In the context of the workplace, a public employee can normally choose to speak, or not to speak, on issues that may incur the wrath of his superiors. A subpoenaed witness has no choice but to appear at a trial, unless he is willing to risk a finding of contempt. Nor does the subpoenaed witness normally have a say in whether he will be called to testify. Retaliation in these circumstances inflicts a punishment on a public employee for performing an act that he could not choose to avoid.

Pro v. Donatucci, 81 F.3d 1283, 1288 (3d Cir. 1996).

As the Court stated earlier, Plaintiffs were not reporting illegal or unethical conduct at the time of their transfer. *Compare with Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 414-14, 99 S.Ct. 693, 696-97 (1979) (employee's statements made in private to employer regarding allegedly discriminatory policies were matters of public concern); *Thompson v. City of Starkville*, 901 F.2d 456, 462-65 (5th Cir. 1990) (police officer who reported extramarital affairs, theft, and mistreatment of black persons spoke primarily as citizen rather than employee).

Rather, Brezina "punished" Plaintiffs, if at all, because of a disagreement regarding Porche's management style, an internal dispute akin to the "mini-insurrection" described in *Connick*. Complaints about teaching assignments and school registration policy are "most accurately characterized as an employee grievance concerning internal [school] policy" and are not matters of public interest. *Ferrara v. Mills*, 781 F.2d 1508, 1516 (5th Cir. 1986). Thus, the Court must conclude that the First Amendment does not protect Plaintiffs' speech, even though the speech took place during a committee meeting.

Conclusion

In *Dorsett*, 940 F.2d at 123-24, the Fifth Circuit noted that federal courts have "neither the competency nor the resources to undertake to micro-manage the administration of thousands of state educational institutions." Plaintiffs cannot transform their personal grievances into matters of public concern "by invoking a supposed popular interest in the way public institutions are run." *Jeffries v. Harleston*, 52 F.3d 9, 14-15 (2d Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 173 (1995).

The Court concludes that Plaintiffs' speech did not address matters of public concern. Therefore, the Court will GRANT Defendants' motions for summary judgment. The Trustee Defendants' motion for sanctions is DENIED.

So ORDERED.

Signed this 29th day of July, 1997.

/s/ John D. Rainey
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 97-41015

DWIGHT HARRIS; GENE MARTIN,

Plaintiffs - Appellants,

VERSUS

VICTORIA INDEPENDENT SCHOOL DISTRICT; PAUL KORNFUEHRER, in his official and individual capacities; CLAY CAIN, in his official and independent capacities; IVAN GREEN, in his official and independent capacities, RANDY POLLARD, in his official and independent capacities; MARGARET EASLEY, in her official capacity only; REUBAN MURRAY, in his official capacity only; THERESA GUITIERREZ, in her official capacity only; ROBERT P BREZINA, in his official and individual capacities,

Defendants - Appellees.

Appeal from the United States District Court
For the Southern District of Texas

ON PETITIONS FOR REHEARING AND REHEARING EN BANC

(Filed July 6, 1999)

Before SMITH, DUHÉ, and WIENER, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on

Rehearing En Banc, (FED. R. APP. P. AND 5TH CIR. R. 35) the Petitions for Rehearing En Banc are also DENIED.

We reiterate that a reasonable school official involved in the factual scenario of this case would know it is unconstitutional to request specific information from teachers who are obligated to respond, and then retaliate against them when they provide unflattering information. We carefully considered the content, form and context of the Plaintiffs' speech and held the Plaintiffs' speech is constitutionally protected because it was in response to Superintendent Brezina's request for an update on the implementation of the improvement plan. The Plaintiffs were charged with this duty as members of the ICC and the SBDM committees. To hold that the Plaintiffs' speech is not protected is to require teachers to sit on their hands, abandoning their legislatively created duties as committee members, allowing the school environment to deteriorate to an even more deplorable level in order to keep their jobs.

Additionally, we note that while our statement in *Noyola v. Texas Dep't of Human Resources*, 846 F.2d 1021, 1026 (5th Cir. 1988) still reflects the law of the circuit, it is distinguishable from the instant case.[1] *Noyola* clearly

---

[1] *One consequence of case-by-case balancing is its implication for qualified immunity* of public officials whose actions are alleged to have violated am [sic] employee's first amendment rights. There will rarely be basis for a priori judgment that the termination or discipline of a public employee violated 'clearly established' constitutional rights.

Noyola, 846 F.2d at 1025, (emphasis added).

refers to the *Pickering* balancing test which balances the employee's interest in free speech against the government as employer's interest in discipline and efficiency in the workplace. It is important to note that in *Harris* the Defendants did not effectively allege that Harris and Martin's speech disrupted the school environment or affected their work in any way. No balancing was required because one side of the scale sat empty. *See Vojvodich v. Lopez*, 48 F.3d 879, 887 (5th Cir. 1995) ("[s]ince Sheriff Lopez has alleged no disruption of governmental functions as a result of Vojvodich's activities, we cannot hold he is entitled to qualified immunity"); *Boddie v. City of Columbus, Mississippi*, 989 F.2d 745, 750 (5th Cir. 1993) (holding qualified immunity unavailable because there was no government interest to balance); *Click v. Copeland*, 970 F.2d 106, 112-13 (5th Cir. 1992) (holding the failure of defendants to claim any disruption in workplace resulting from speech is fatal to his claim of qualified immunity).

Judge Smith dissents from the denial of panel rehearing for the reasons set forth in his dissent from the panel opinion.

ENTERED FOR THE COURT:

/s/ John M. Duhé
United States Circuit Judge

JERRY E. SMITH,
Circuit Judge, dissents from the denial of panel rehearing for the reasons set forth in his dissent from the panel opinion.

EXHIBIT A

AFFIDAVIT OF ROBERT PAUL BREZINA

STATE OF TEXAS §
§
COUNTY OF HARRIS §

On this date Robert Paul Brezina personally appeared before me, the undersigned Notary Public, and after being duly sworn stated the following under oath:

"My name is Robert Paul Brezina. I am over 18 years of age; I reside at 410 Colony Creek, Victoria, Texas 77904; I have never been convicted of a crime; and I am fully competent to make this affidavit. I have personal knowledge of the facts stated herein, and they are all true and correct.

During the 1995-96 school year, I was employed as the Superintendent of Schools for the Victoria Independent School District (Victoria ISD). In August of 1995, Dwight Harris and Gene Martin, both employees of the Victoria ISD, voiced their concerns to me about the administration at Victoria High School (VHS) by principal Melissa Porche, Mr. Harris and Mr. Martin stated that they believed Principal Porche lacked respect for the faculty and had problems making decisions and handling the scheduling of classes. They gave me a letter titled "Concerns at Victoria High School" (herein the "Concerns Memo), which is attached to this Affidavit as Exhibit A. After hearing their concerns, I assured them that I would look investigate [sic] their concerns.

A few hours after assuring Mr. Harris and Mr. Martin that I would look into the matter, I learned that Mr.

Martin had distributed the Concerns Memo to faculty members at VHS. The letter was categorized into the following areas: 1) "scheduling;" 2) "decision making;" 3) "no respect for teachers;" 4) "she is a bully;" 5) "poor decision making skills;" 6) "vindictive;" and 7) "does not consider consequences of decision." I believed that distribution of the Concerns Memo, before I had an opportunity to talk to individuals at VHS, tainted any investigation I would conduct. Therefore, still wanting to address Mr. Harris and Mr. Martin's concerns, I retained an educational consultant, Dr. Fairman, to conduct an "organizational health survey" at Victoria High School in an effort to identify and ultimately address any problems at VHS.

The organizational health survey revealed some problems with the organizational health of Victoria High School. Therefore, In September of 1995, I met with the VHS faculty and administration to address the problem areas. I requested that faculty members from the Site Based Management ("SBDM") Committee, Dr. Fairman, and Principal Porche work together in an Organizational Health Committee to assist in facilitating a resolution to the conflicts and/or concerns. I did not include the community members of the SBDM on the Committee to work with Dr. Fairman. I also instructed this group to keep all discussions made during Committee meetings confidential so as not to hinder the group's ability to resolve the conflicts and/or concerns. After several meetings, the Committee drafted a plan to improve the organizational health of VHS. After reviewing the Committee's draft

plan, I assured the team that I would actively and diligently attempt to use proven methods to resolve some or all of the issues.

During a December 8, 1995 meeting with the Organizational Health Committee including me, Principal Porche and Dr. Fairman, and prior to the implementation of the *final* plan, Mr. Harris and Mr. Martin demanded that their instructional leader, Principal Porche, be terminated; otherwise, they threatened they would revolt. Mr. Harris said words to the effect there was "no way in the world" he could support the leadership at Victoria High School. In addition, at that December 8, 1995 meeting, after making the above comments, Mr. Harris and Martin deliberately turned their chairs away from Principal Porche, so that their backs were toward her. Mr. Harris stood up, crossed his arms, very conspicuously stared out the window and made it clear he would not participate any further in the Committee meeting. I considered their conduct at that meeting to be disrespectful to me, Principal Porche, and to the process we were working on. I later learned the Mr. Harris and Mr. Martin began placing telephone calls to members of the Victoria ISD Board of Trustees in which they made the same demands and threats. Based on all of this, it appeared to me that Mr. Harris and Mr. Martin had completely abandoned their support and commitment to the goals and plan for improvement and instead sought to oust their supervisor and Instructional leader, Principal Porche.

Based on Mr. Harris and Mr. Martin's demands to have Melissa Porche removed as principal of Victoria High School and actions at that December 8th meeting, I concluded that Mr. Harris and Mr. Martin lacked the

necessary commitment to the goals developed in the plan. I believed Mr. Harris and Mr. Martin's actions would disrupt the learning environment, undermine the authority of those responsible for the implementation of the plan, and hinder the close working relationships that were necessary in order for the plan to work. I believed that Harris and Martin's lack of support for the plan and Ms. Porche would disrupt the effort to improve VHS. This was based on my belief that the plan was developed specifically with Ms. Porche as principal of VHS and that she was an integral component of the plan. I also believed that as members of the committee working with Dr. Fairman, Mr. Harris and Mr. Martin's support of the plan was essential to its success in resolving the concerns they identified in the Concerns Memo. Therefore, I believed that failing to support Ms. Porche was tantamount to failing to support the plan. Therefore, as superintendent of schools, I believed it was necessary and in the best interest of Victoria ISD to reassign and transfer Mr. Harris and Mr. Martin to other schools within the district. Retaliation, as claimed by Mr. Harris and Mr. Martin, played no part in my decision to reassign and transfer them.

I made the decision on December 8, 1995 that something had to be done concerning Mr. Harris and Mr. Martin. I wanted to consider my options over the Christmas Holidays. Reassignment and transfer were the least severe restriction I considered involving no loss of pay, seniority, or benefits of any kind. Mr. Harris and Mr. Martin were subject to reassignment under their employment contracts with the District. Mr. Harris and Mr. Martin were not demoted nor were they officially reprimanded in any way. On January 9, 1996, I informed Mr.

Harris and Mr. Martin that they would be assigned to other school [sic] in the District.

On January 18, 1996, Mr. Harris and Mr. Martin filed a Level II Grievance with me. On January 23, 1996, I conducted a Level II Grievance Hearing with Mr. Harris and Mr. Martin. After considering the arguments of Mr. Harris and Mr. Martin, I informed them on January 24, 1996, that it was in the best interest of the District that their reassignment and transfer stand. Mr. Harris and Mr. Martin both appealed to a Level III Grievance Hearing to be held by the Board of Trustees of the Victoria Independent School District.

On March 5, 1996, a Level III Grievance Hearing was held before the Board of Trustees of the Victoria ISD. I was present at and participated in this grievance hearing. After hearing arguments, the Board of Trustees voted to upheld [sic] my decision to reassign and transfer Mr. Harris and Mr. Martin.

Attached to this Affidavit as Exhibits A-1 and A-2, respectively, are Mr. Harris and Mr. Martin's employment contracts for the 1995-1996 school year. I have reviewed these employment contracts and verify that they are true and correct copies of Mr. Harris and Mr. Martin's contracts. Also attached to this Affidavit as Exhibits A-3 and A-4 are the January 9, 1996 letters I gave to Mr. Harris and Mr. Martin informing them of their transfers. I have reviewed these letters and verify that they are true and correct copies of the letters given to Mr. Harris and Mr. Martin. Attached as Exhibit A-5 and A-6, respectively, are

true and correct copies of VISD policies governing reassignments and employee grievances. Attached as Exhibit A-7 is a true and correct copy of the Concerns Memo.

At all relevant times, as Superintendent of Victoria ISD, I was the custodian of records. The above describe [sic] records were kept by Victoria ISD in the regular course of business, and it was the regular practice of Victoria ISD for an employee or representative of the District, with knowledge of the act, event, condition, opinion, or diagnosis recorded, to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time of the events described therein. The records attached hereto are true and correct copies of the originals.

/s/ Robert P. Brezina
Robert P. Brezina

SUBSCRIBED AND SWORN TO BEFORE ME, on this 5th day of June, 1997.

/s/ Bebe J. Pinter
Notary Public in and for the State of Texas

Name: Bebe J. Pinter
My Commission Expires: 8/3/2000

[SEAL]

EXHIBIT NO.3

Concerns At Victoria High School

1. SCHEDULING – *There have been many problems with scheduling this year. Mrs. Porche did not run the schedule early enough in order for the necessary corrections and changes to be made prior to students getting their schedules. You can check with data processing in order to find out when it was completed. Student schedules were run just prior to the day they were handed out. (August 14th) The guidance department had not seen the schedules before August 14th. The guidance department had no input on scheduling.*

2. DECISION – MAKING – *Mrs. Porche overrides teacher and counselor decisions. One example is the way registration was done. Also, special preference was given to kids in football. When some of the players were having trouble getting their schedules, Mark Reeves was able to get them when other parents were still waiting. This is not to be taken as a criticism of the coach but rather the unequal treatment of other students allowed by Mrs. Porche. The counselors were not allowed to hand out schedules until corrections were done, yet they were under tremendous pressure to get them out. It was an impossible task under the circumstances. There* [sic] *suggestions are usually ignored.*

3. NO RESPECT FOR TEACHERS – *At the first faculty meeting this year Mrs. Porche felt some teachers were not paying attention and referred to us as being "just like her class" and proceeded to chastise the entire group. Last year she paid no attention to the teachers on the Site Based Decision Committee when they brought concerns to her. Also last year at a end of year meeting when one teacher expressed concerns about trying to keep discipline in her room, Mrs. Porche*

insinuated in front of the faculty that perhaps the teacher did not know how to manage her class.

4. SHE IS A BULLY – When a teacher last year expressed concerns and questions over the budget, she was called in an [sic] *chewed out. The director of guidance was chewed out after he tried to explain to the faculty how registration would be done. (last year) Mrs. Porche did not like the way he indicated that teachers would be able to decide how the registration would be done.*

5. POOR DECISION MAKING SKILLS – There was an assembly on the first day of school. It was not announced until second block. I think Mrs. Porche forgot that it had been scheduled. We received no "back to school letter" telling us about first day activities. Last years campus improvement plan was not shown to teachers on the committee until two days before we were asked to present it at a faculty meeting.

6. VINDICTIVE – Several teachers who have disagreed with Mrs. Porche or questioned her decisions have been assigned classes they did not desire.

7. DOES NOT CONSIDER CONSEQUENCES OF DECISIONS – Examples are teacher assignments, delay in preparing master schedule, first day assembly, and scheduling.

Something must be done to change the situation at VHS or the faculty will revolt. Here are some recommendations that you should strongly consider.

1. Move Mr. Cardosa to Crain, Mrs. Porche to Mitchell, Mr. Nichols to VHS, Mr. Rendon to personnel, and hire an administrative assistant.

2. Terminate the contract of Mrs. Porche and hire a replacement.

3. If she stays at VHS the following things must happen:

A. She must consult and use the advice of her assistants and counselors.

B. She must consult and use the advice of the SBDM team.

C. There must be SBDM meetings ever two weeks covering the areas required by law.

D. If teachers or staff are overruled she must state in writing the reasons why.

E. Her progress or lack thereof must be reported to the Superintendent by a campus representative.

VHS has a proud tradition and in order to regain that tradition, we are asking you to take some strong steps so that the staff can get back to educating our kids.

[LOGO] VICTORIA INDEPENDENT
SCHOOL DISTRICT

Robert P. Brezina, Superintendent

January 8, 1995

Mr. Dwight Harris
Victoria High School
1110 Sam Houston
Victoria, TX 77901

RE: 1996 Teaching Assignment

Dear Dwight,

Over the past several months you have expressed to me a significant level of discontent regarding problems that you perceive at Victoria High School. In response to these concerns and in an effort to create the best possible learning environment for the students at Victoria High School, we set out on a process which included developing a plan of action. You were selected as a member of this team in your capacity as a member of the faculty at Victoria High School and a member of the V.H.S. Site Based Management Team. At the beginning of this process, you made a commitment to the goals developed by the planning team which included the campus administration, your fellow faculty and staff members, Mr. Marvin Fairman, the consultant I brought in to assist in facilitating a resolution to the conflicts and/or concerns and me. The members of this important team have worked many long hours in developing a plan which will guide Victoria High School in the years to come. Throughout this process I have strived to assure you and

the other members of the faculty and Site Based Management Team that I am actively and diligently attempting to use proven methods to resolve some or all of these issues.

It is my belief that the members of the faculty and staff, and certainly members of the Site Based Management Team, must be committed to these goals and plan for improvement if it is going to succeed. I also believe that a lack of commitment to these goals will serve to disrupt the learning environment, undermine the authority of those responsible for the implementation of the plan and hinder the close working relationships that are necessary in order for the plan to succeed. Recent events, statements and other conduct on your part have led me to the conclusion that you are unable and/or unwilling to maintain the commitment you made to the [sic] these goals and to the improvement process. It is apparent to me that neither the team nor I will be able to bring about a resolution that will satisfy you and remove or alleviate your discontent.

After many hours of thoughtful consideration, I have reached a decision which I hope will allow you to devote more of your time and energy to teaching and alleviate the stress and conflict which you associate with your assignment at Victoria High School.

Therefore, pursuant to the terms of your contract with Victoria Independent School District and the Guidelines of the V.I.S.D. Policy Manual you are being reassigned from your current teaching position at Victoria High School. Effective immediately, your teaching assignment for the remainder of the 1995-1996 school year, and until further notice, will be at Stroman High School. You shall

no longer have any responsibilities at Victoria High School. Please remove all personal belongings and any instructional materials which you may need in your new assignment from the Victoria High School campus immediately and report to Dr. Annette Scott, Stroman High School Principal. To assist in facilitating an efficient transition I have instructed Mrs. Porché to have either custodial or security personnel available to remove your materials and transport them to your new campus. All property or materials which are assigned to Victoria High School should be either turned in to Mrs. Porché or one of the Assistant Principals at Victoria High School.

To further assist you in the transition, I have directed Dr. Scott to provide a substitute for the next three instructional days of this school term so that you can use that time acquainting yourself with your new campus and have quality, productive time in which to prepare your instructional plans and materials needed for your new assignment.

I hope this new assignment will alleviate the stress and concerns which you relate to your assignment at Victoria High School and provide you with a working environment which you will find more personally rewarding and satisfying. Your salary for the remainder of the 1995-1996 school year will, of course, remain as it is stated in the contract you signed on or about May 19, 1995. I believe this decision to be in your best interest, the best interest of Victoria High School and its students and the best

interest of Victoria Independent School District. I wish you well in your new teaching assignment.

Sincerely,

/s/ Robert P. Brezina
Robert P. Brezina
Superintendent Of Schools

[LOGO] VICTORIA INDEPENDENT
SCHOOL DISTRICT

Robert P. Brezina, Superintendent

January 8, 1995

Mr. Gene Martin
Victoria High School
1110 Sam Houston
Victoria, TX 77901

RE: 1996 Teaching Assignment

Dear Gene,

Over the past several months you have expressed to me a significant level of discontent regarding problems that you perceive at Victoria High School. In response to these concerns and in an effort to create the best possible learning environment for the students at Victoria High School, we set out on a process which included developing a plan of action. You were selected as a member of this team in your capacity as a member of the faculty at Victoria High School and a member of the V.H.S. Site Based Management Team. At the beginning of this process, you made a commitment to the goals developed by the planning team which included the campus administration, your fellow faculty and staff members, Mr. Marvin Fairman, the consultant I brought in to assist in facilitating a resolution to the conflicts and/or concerns and me. The members of this important team have worked many long hours in developing a plan which will guide Victoria High School in the years to come. Throughout this process I have strived to assure you and

the other members of the faculty and Site Based Management Team that I am actively and diligently attempting to use proven methods to resolve some or all of these issues.

It is my belief that the members of the faculty and staff, and certainly members of the Site Based Management Team, must be committed to these goals and plan for improvement if it is going to succeed. I also believe that a lack of commitment to these goals will serve to disrupt the learning environment, undermine the authority of those responsible for the implementation of the plan and hinder the close working relationships that are necessary in order for the plan to succeed. Recent events, statements and other conduct on your part have led me to the conclusion that you are unable and/or unwilling to maintain the commitment you made to the these goals and to the improvement process. It is apparent to me that neither the team nor I will be able to bring about a resolution that will satisfy you and remove or alleviate your discontent.

After many hours of thoughtful consideration, I have reached a decision which I hope will allow you to devote more of your time and energy to teaching and alleviate the stress and conflict which you associate with your assignment at Victoria High School.

Therefore, pursuant to the terms of your contract with Victoria Independent School District and the Guidelines of the V.I.S.D. Policy Manual you are being reassigned from your current teaching position at Victoria High School. Effective immediately, your teaching assignment for the remainder of the 1995-1996 school year, and until further notice, will be at Mitchell Guidance Center. You

shall no longer have any responsibilities at Victoria High School. Please remove all personal belongings and any instructional materials which you may need in your new assignment from the Victoria High School campus immediately and report to Mr. Lionel Cardosa, Mitchell Guidance Center Principal. To assist in facilitating an efficient transition I have instructed Mrs. Porché to have either custodial or security personnel available to remove your materials and transport them to your new campus. All property or materials which are assigned to Victoria High School should be either turned in to Mrs. Porché or one of the Assistant Principals at Victoria High School.

To further assist you in the transition, I have directed Mr. Cardosa to provide a substitute for the next three instructional days of this school term so that you can use that time acquainting yourself with your new campus and have quality, productive time in which to prepare your instructional plans and materials needed for your new assignment.

I hope this new assignment will alleviate the stress and concerns which you relate to your assignment at Victoria High School and provide you with a working environment which you will find more personally rewarding and satisfying. Your salary for the remainder of the 1995-1996 school year will, of course, remain as it is stated in the contract you signed on or about May 19, 1995. I believe this decision to be in your best interest, the best interest of Victoria High School and its students and the best

interest of Victoria Independent School District. I wish you well in your new treaching assignment.

Sincerely,

/s/ Robert P. Brezina
Robert P. Brezina
Superintendent Of Schools

Board Minutes March 5, 1996

* * *

Item B. Conduct Level Three hearing for Dwight Harris and Gene Martin and consider, deliberate and/or take action in that regard.

[If during the course of the hearing covered by this notice, a majority of the Board members present should determine that a closed or executive session of the Board or a consultation with the Board's attorney be held or is required, then such closed or executive session authorized by the Texas Open Meetings Act, Texas Government Code Chapter 551, section 551.071, to meet in closed session with the Board's attorneys to discuss pending or contemplated litigation and other attorney/client matters will be held.]

Mr. Kornfuehrer stated that the next item on the agenda is to conduct a Level Three hearing for Mr. Dwight Harris and Mr. Gene Martin, and to consider, deliberate and/or take action in that regard. The format of this hearing is: each side will have five minutes for opening statements, each side will have thirty minutes to present its case, and each side will have five minutes for closing statements.

Mr. Mark Rains, VISD's legal counsel, in opening statements announced that this is a Level Three hearing regarding the reassignments of two teachers, Mr. Dwight Harris and Mr. Gene Martin from Victoria High School by Superintendent Brezina. The allegations are that their reassignments are based, in part, on retaliation for speaking out for a portion of the faculty at Victoria High School, and that the reassignments violate their Constitutional First Amendment Rights.

Mr. Rains stated that while it is very possible to speak your mind, it is also very possible to speak consistent with first amendment rights and privileges. In fact, this was very much encouraged during the process that Mr. Brezina implemented for an improvement plan at Victoria High School. However, the Courts have made it eminently clear that there is a line over which an employee cannot go. Employees cannot be insubordinate, cannot be disrespectful, and cannot be unprofessional by conduct or actions. This is a situation where two individuals go to the Superintendent and demand that the Superintendent make multiple reassignments within the District in order to satisfy their demands. The Superintendent did not make those reassignments. These two individuals went back to the campus despite Mr. Brezina's assurance that he would look into those concerns and tainted his process by circulating a letter, in detail, to all the teachers on the campus which berated their superior and their principal, Ms. Melissa Porché. The letter was signed by Mr. Gene Martin.

Mr. Brezina chose another path. He hired an organizational development and conflict resolution consultant, Dr. Marvin Fairman, through a grant provided by the University of Houston, to formulate a growth plan to improve the organizational health and effectiveness of Victoria High School. It was a plan that was customized around Ms. Melissa Porché as the leader and Victoria High School as the campus starting with the first meeting of the faculty on September 15, 1995.

Dr. Fairman prepared a specific plan for improving the organizational health and effectiveness of Victoria High School. At the meeting prior to the final implementation

and presentation to the faculty, Mr. Harris and Mr. Martin once again took the position of polarization to the Superintendent and to their Principal that they would not support anything regarding that plan as long as that plan includes Ms. Melissa Porché as the leader. No entities, not even governmental entities allow or are required to allow the employees to dictate who their boss is going to be.

After evaluating the statements, the conduct, and the behavior of these two individuals and the commitments made as part of the team that had spent three months developing an improvement plan, Mr. Brezina decided, in the best interest of this District, to remove those two individuals from that campus for their benefit and for the benefit of that campus. He decided to pursue the efforts of six individuals plus Dr. Fairman, as strategies for an effective and healthy organizational plan, and to give the plan a chance to succeed. Mr. Brezina's action was in no way based on any expression of First Amendment Rights. His reassignments were based upon what is best for this District.

Ms. Eleanor Gonzalez, President of the Victoria Federation of Teachers, presented opening statements for former Victoria High School teachers, Mr. Dwight Harris and Mr. Gene Martin. She stated that on January 18, 1996, the Victoria Federation of Teachers filed a grievance against Mr. Robert Brezina for his actions taken against Mr. Harris and Mr. Martin for transferring them from Victoria High School without prior notice. Ms. Gonzales stated that Mr. Harris and Mr. Martin were transferred for conveying the sentiments and voicing the concerns and wishes of the teachers they were elected to represent as part of the VHS Site Based Decision Team. Their duties

were all performed under protective speech as members of this campus team.

Ms. Gonzalez stated that all of this turmoil could have been avoided if Mr. Brezina had picked up the telephone and called Mr. Harris and Mr. Martin for a conference. She asked the Trustees to review all the facts, review all the information, and to reconsider the decision made by Mr. Brezina.

Several witnesses were questioned by the District's legal counsel, Mr. Rains, and by the Victoria Federation of Teachers Grievance Officer, Mr. Dwight Harris. Witnesses included Mr. Robert Brezina, Dr. Marvin Fairman, VHS faculty members, Ms. Dorothy Flakes, Mr. Joe Burgamy, Ms. Janice Plowman, Mr. Jim Payne, and former VHS teacher, Mr. Gene Martin.

Mr. Rains, in his closing remarks for the District, stated that the questions being asked on the leadership problems clearly failed to recognize Dr. Fairman's well stated assessment of the problems at VHS. Mr. Brezina's decision was based on exactly the same problems that Mr. Martin and Mr. Harris had. The only problems they saw were with the leader while Dr. Fairman stated that the organization was unhealthy. This means the faculty, including the members of the Site Based Team which also has a duty and responsibility to try to make things better, not to look at the Superintendent and order him to remove people from positions in this District; not to dictate to him or attempt to dictate to him what is in the best interest of their group on that campus. Mr. Brezina's duty is to the whole District. He hired Dr. Fairman to come in, assess and improve the overall organizational

health and effectiveness of Victoria High School. Mr. Martin and Mr. Harris undermined Mr. Brezina's effort. This has nothing to do with leadership. It has to do with the Superintendent's responsibility to manage this District in a healthy manner. That requires him, in his authority and his judgment, to make transfers or any other personnel action. That is what you as a Board hired him to do and that is what he did.

Mr. Dwight Harris, Grievance Officer for the Victoria Federation of Teachers, in his closing remarks stated that it is their sincere belief that they were retaliated against for participating in an activity which was designed by the District. They believed that their actions, as they participated in them, were in accordance with the District's policy and in line with the roles as committee members. They were elected by their peers on the VHS faculty to represent them and they did that to the best of their ability. When they spoke out concerning the leadership problems at VHS, they were engaged in protected speech. It is their belief that the Texas and the U.S. Constitutions afforded protection to them. They were duly elected representatives of the faculty expressing views that had been shared with them. Their reputations have been damaged and both have suffered embarrassment as a result of their unexpected and sudden transfers. Mr. Harris denied the allegations made by Mr. Brezina in his letter transferring them. Specifically, they were expressing the discontent of the faculty and not their own. Their transfers were retaliations. He stated that the Board has not been ruled to vote on these transfers, however if the Board upholds the decision by the Superintendent, a message will be sent to the entire District that there is no justice in VISD. He

urged instead to send a message that says there is justice in VISD, there is integrity in VISD, and there is honor in VISD.

Mr. Harris cited the case of Hasselback *versus* Dallas ISD in a ruling of protected speech. The case relates to the transfer of an elementary teacher stating that a transfer has to be for a permissible reason, not just any reason. Mr. Harris stated that their transfers were without any justifiable reason and requested that the Board rescind the transfers.

After hearing both sides of the case, the Trustees deliberated by asking additional questions of Dr. Fairman, Mr. Brezina, Mr. Harris, and Mr. Rains.

Mr. Cain made a motion that the Board uphold the decision made by the Superintendent and the administration.

The motion was seconded by Mr. Green.

Voting for the motion:
Mr. Cain, Mr. Green, Mr. Kornfuehrer, Mr. Pollard

Voting against the motion:
Mrs. Gutierrez

Abstaining:
Mrs. Easley, Mr. Murray

The motion carried 4-1-2.

* * *

Oral Deposition of Dwight Harris

By Mr. Michel

* * *

[p. 128] Q. Did anyone else that you were able to observe?

A. Show any disrespect to Ms. Porche?

Q. Yes, sir.

A. Not that I'm aware of.

Q. Mr. Harris, is it true that some of these discussions involved – I mean, got quite personal, involved fairly personal issues regarding Ms. Porche?

A. I'm not sure I know what you mean by personal issues. They all involved the issues related to her job as a principal at Victoria High School.

Q. Okay. And that's what all these discussions at these – all these meetings involved?

A. Yeah. Yeah. Well, we weren't talking about her personally.

Q. Okay.

A. At least I wasn't and I don't recall anybody else doing that either.

Q. So these discussions merely involved her and her job performance and that – and how it related –

A. At that school?

Q. – At Victoria High?

A. That's correct. That's correct.

Q. Okay. When was the next meeting? Oh, wait a minute. Can you tell me was there a set of guidelines or goals? I believe you said earlier that some type of

* * *

[p. 152] there should have been no reason for me to be reassigned. I mean, if I had said something that wasn't true, if I had done something that violated policies I would have said that's fine but I didn't do that and I think they should have known that but I think they just totally ignored it and did what they wanted to do.

Q. Well, let's try to iron that down. Basically what you are saying is the fact that they voted the way they voted in the grievance hearing is the only reason that you have sued them in their individual capacities?

A. Well, because I think they were doing that in the total face of all of the evidence to the contrary that they shouldn't have done it.

Q. Is that a yes, Mr. Harris?

A. No. I think it's the truth. That's what I think.

Q. Mr. Harris, the question was, is the reason that they – that you have sued them in their individual capacity merely because of the way they voted in the grievance hearing?

A. No. The reason is because they voted that way in my opinion in total disregard for the law.

Q. Okay. As you interpret it?

A. As I understand it.

Q. Did these four individuals do anything else other than [p. 153] vote at this grievance hearing, any other acts that you are aware of that indicated that they were retaliating against you?

A. Well, I think I mentioned this earlier that after my transfer and before my hearing that Mr. Brezina did discuss that transfer in closed session with the Board members and that would be another part of my thinking right there is that they shouldn't have been doing that.

Q. Anything else? Anything at all, Mr. Harris?

A. Nothing else that I can think of.

Q. Okay. Now, Mr. Harris, this is the only time we are going to be able to ask you these questions and that's prior to trial so I wanted to make sure that we get down everything that you are alleging that my clients did in violation of your First Amendment Rights. Okay? So if there's anything else, please tell me now.

A. I can't think of anything else right now.

Q. Now, Mr. Harris, on this vote that was had at your grievance hearing, wasn't it they just denied your grievance. Is that correct?

A. Yeah. They voted to deny it.

Q. Okay. Mr. Harris, when you were answering questions this morning I believe you stated that the parts of

* * *

Oral Deposition of Gene Martin

By Mr. Youngblood

[p. 158] that these individual board members did that was in any way a retaliation against you for what you feel is your right to free speech?

A. Okay. Can I ask a clarification here?

Q. Absolutely. Absolutely.

A. I do not believe that the Board was trying to violate my free speech. I do not believe that. I believe that the Board did violate my free speech because they had an opportunity to overturn an action that violated my free speech and they did not. That's what I'm contending. Now I can live with the fact that reasonable minds can disagree and they may have seen it differently from what I did but that's my contention.

Q. I understand that. I understand that. My question is –

A. Okay.

Q. – and I think we boiled it down a minute ago that when we just look at what acts are you complaining of that these individual board members did that single act is the vote?

A. That's the only thing that I know that they did that violated my free speech if that's what you are asking.

Q. That's my question. There was nothing else?

A. Not that I know of.

Q. Okay. Let's go back to that concern. That letter concerns Victoria High School. I believe that's in

* * *

Oral Deposition of Dwight Harris

By Mr. Michael

* * *

[p. 170] these types of comments? Would it have been while the Organizational Health Committee was meeting or during that time period?

A. I don't recall that.

Q. If someone were to testify that it was during that period of time that these calls were being made would you dispute that?

A. No. What I would say is at a time that I would have made those calls to any Board members I would have been expressing my concerns as an individual person as to what I thought the problems were and not reflect – trying to reflect the will of the faculty which was what my job was on that day.

Q. Oh, Okay. So that would have been a reflection of your personal concerns. All right. Is that correct?

A. Yeah.

MR. YOUNGBLOOD: I think I'm gong to pass the witness.

MS. OWEN: Okay. Mr. Rains?

MR. RAINS: I'd probably reserve any that I would have.

MS. OWEN: Reserve them until?

MR. RAINS: For trial.

MS. OWEN: For trial. All right. I want to note for the record that Mr. Rains did provide me and I

* * *

Witness: Robert Brezina Date: 05-19-97
Re: Harris VS Y.I.S.D., Et Al.

* * *

[p. 140] **A There we go with words again, What is significant? I knew there was a problem that's why we were working on it.**

Q Well, I mean, was it a problem that you thought, you know, that you personally were concerned about?

A No. I was concerned, but we had a plan in place and we were moving in the right direction and positive things were happening on that campus.

Q Okay, but after the December 8th meeting, okay, you described what occurred there –

A Right.

Q And then you hear about this meeting out at the mall –

A Uh-huh.

Q – where at least 61 teachers attended. By the time you heard about the meeting at the mall had you begun to think that perhaps the improvement plan wasn't going to fix the problem at the high school?

A It hadn't even started yet.

Q Well, I mean, were you getting concerned that you had a real problem on your hands?

A No, I was concerned that there was a bunch of [p. 141] **undermining going on –**

Q Okay.

A – In regards to the plan.

Q Okay. All right and so what did you resolve to do about that?

A At that particular meeting, nothing.

Q What particular meeting?

A The one you're talking about.

Q The mall meeting?

A (Witness nods head.)

Q Okay, you're saying that as a result of the mall meeting you didn't form any sort of plan about what to do?

A No.

Q Okay.

A It was done before that.

Q Okay, your decision to transfer Mr. Harris and Mr. Martin was made before the meeting at the mall?

A It was not to transfer, but to – something had to be done in that regard.

Q Okay, you were gonna take some sort of disciplinary action against them?

A Yes.

Q Okay and what did you consider your options [p. 142] *to be?*

A From transferring to terminating. All those inbetween. [sic]

Q Okay.

A Administrative leave with pay, without pay, and all the other options that I had.

Q Okay. Were you concerned that if the Board of Trustees learned of the problems at the high school that that might reflect poorly on you?

A The Board – Teachers called board members all the time.

Q Uh-huh. Were teachers calling board members a lot at this time about the situation at the high school?

A I would think some specific ones.

Q Okay, do you know who – Who are you referring to?

A Probably Gene and Dwight.

Q Okay, you think Gene and Dwight were calling board members?

A Oh, absolutely.

Q Okay, but did you have any sort of concern that that was going to affect what the Board thought of your performance?

[p. 143] **A (Witness nods head.)**

MR. RAINS: Answer.

A No.

Q No? That wasn't a concern to you?

A No. I've got a job to do and I got to do it.

Q Okay. Have you ever heard a tape that was made at the meeting at the mall?

A Not that I recall.

Q Have you heard that there is such a tape?

A Not that I know of.

Q Okay. Did you ever hear that Debbie Garner had made a tape of that meeting?

A I don't know anything about it.

Q Okay, you never listened to it?

A No.

Q Okay. Okay, I want to make sure I'm clear on this point. It's your testimony that no faculty members came and talked to you about Ms. Porche as an outgrowth of that meeting at the mall.

A Not that I can recall.

Q Okay. Okay, in your answers to the interrogatories, and I believe it's – we had those marked as Exhibit No. 12. And if you'll look at your answer to interrogatory [p. 144] *No. 10 again, I think it's on page 18. And I want to direct your attention again to that – the last paragraph on the page.*

A Okay.

Q Okay, you say in there that there was a meeting between yourself, your cabinet and the District's legal counsel in late 1995. Do you see that?

A Yes.

Q Okay. Now, do you recall the date of that meeting?

A No, I do not.

Q Was it after the mall meeting had taken place if the mall meeting was on December 14th?

A I don't recall. I could say it was after December the 9th.

Q Okay.

A Or 8th. Whatever that meeting was.

Q Okay, of the Site Based committee?

A of the internal Component.

Q Okay and what was the purpose of that meeting?

A To discuss those options.

Q All the different employment actions that you had available to you?

[p. 145] **A Yes.**

Q Okay and I think this was the reference that I was asking you about when we first started your deposition. Where it says your cabinet?

A Uh-huh.

Q Is this the assistant superintendents?

A And probably Billy Nichols.

Q Okay. Now, why was Mr. Rains there?

A On the second meeting?

Q Uh-huh.

A Because I was gonna get into policy issues and legal issues and I wanted to make sure I was standing on good ground.

Q Okay so you had him there as the administration's attorney?

A Yes.

Q Okay. Did you have the authority, at least as far as you understood it, to engage Mr. Rains' services whenever you wanted to or is that something that the Board had to approve?

A I had an option.

Q Okay, the Board had given you that option?

A Yes.

Q Okay. Did you take notes?

* * *

Witness: Theresa Gutierrez Date: 05-20-97
Re: Harris VS V.I.S.D., Et Al.

* * *

[p. 43] *Q All right. When Mr. Brezina informed the Board that he had transferred Mr. Martin and Mr. Harris, did he give the Board reasons for taking that action? Don't tell me the reasons just yet. I'm gonna try and go slowly here.*

MR. MICHEL: She's correct you can [p. 44] answer that question limited to that response.

Q Did he give the Board reasons for his action?

A It is my belief he did not.

Q Okay so he will [sic] *merely informed the Board that he had done that, is that correct?*

MR. MICHEL: You can answer that.

A That is correct.

Q Okay. Did the board members question him about why he had taken that action?

MR. KING: For simplicity, I just want to make a running objection on the entire line of questioning that will continue.

MS. OWEN: Okay.

MR. MICHEL: I think you can answer that in the context of a yes or no.

Q Okay.

MR. MICHEL: You may have to repeat the question again.

A Thank you.

MS. OWEN: And I've forgotten. Can you read it back? Oh, I know what it was

Q Did the board members ask him why he had done [p. 45] *that?*

A Yes.

Q Okay. And when you said a minute ago that in your opinion he did not give you reasons. I'm unclear about what you meant. Do you – Let me ask the question. Do you mean by that that he gave you information but you didn't think that it adequately addressed the questions that were being asked or did he just refuse to give you reasons?

MR. MICHEL: You can answer that question.

A He gave in his estimation of what a reason was. I can speak only for myself. I was not satisfied with his reason.

Q Okay. What reason did he give you?

MR. MICHEL: You can answer that.

A He attributed the turmoil in the campus to those two gentlemen, and those two gentlemen I'm referring to are Gene Martin and Dwight Harris.

Q Okay. He told the Board that they were causing turmoil on the campus?

A Not in those words.

Q Okay, but words to that effect?

[p. 46] **A Words to that effect.**

Q All right so was it your understanding that Mr. Brezina was attributing the problems on the campus to Mr. Harris and Mr. Martin rather than to Ms. Porche?

MR. MICHEL: You can answer that.

A He felt the problem could be resolved by the transfer.

Q Okay and he made that representation to the Board?

A He made that representation to the Board.

Q Okay. Did you hear from any source about a meeting which precipitated the transfers, a meeting that took place on December 8th?

A I don't understand your question.

Q Did you – I believe that the evidence in this case will show that one of the main events was a meeting that occurred on December 8th of this committee that had been working with Dr. Fairman, and there's been testimony about actions and words by Mr. Harris and Mr. Martin at the December meeting, and I'm wanting to know if you heard from anyone about what had taken place at this committee meeting in December.

[p. 47] **A Oh, you're talking about the committee meeting at Victoria High School, the one –**

Q Yes.

A Oh, no. No.

* * *

Witness: Randy Pollard Date: 05-20-97
Re: Harris VS V.I.S.D., Et Al.

* * *

[p. 31] *that correct?*

A Yes.

Q Okay and you were aware that this consultant had been hired by the district to come in and try and improve the organizational health on that campus, correct?

A Yes.

Q Okay and you were aware as part of that process that he did a survey to determine the organizational health of the campus, correct?

A Yes.

Q Okay and my question is weren't you curious to see what the survey showed about the organizational health?

A I probably was, but like I say, I don't remember.

Q Okay.

A And I very well may have seen the survey, I just don't recall.

Q Okay and you don't recall – It didn't – Did it seem like to you that Mr. Brezina was hesitant to communicate to the Board about the problems at the high school?

A No, I don't think so.

Q Okay so at least as far as you were [p. 32] *concerned, you were getting satisfactory information from Mr. Brezina about the situation at the high school.*

A The best that I can recall right now, yes ma'am.

Q Okay. When you had this phone conversation with Mr. Brezina in December and he alerted you to his concerns over the behavior of Mr. Harris and Mr. Martin in connection with the committee, were you surprised by what he told you about Mr. Harris and Mr. Martin?

A Somewhat.

Q Okay, what was surprising to you about it?

A It was, you know, it was surprising to me that – it was surprising to me that the process was actually

being jeopardized. Yeah, it was the main thing that surprised me.

Q You were surprised that Mr. Harris or Mr. Martin would do something to jeopardize the process?

A I was surprised that anybody on the committee would do anything like that.

Q Okay. Did you think that transferring Mr. Martin and Mr. Harris was a serious step [p. 33] *to take?*

A I don't understand the question.

Q Well, I believe you said that you thought that Mr. Brezina had mentioned several options.

A Yes.

Q Okay, of the options that he mentioned was transferring Mr. Martin and Mr. Harris the most drastic?

A I don't recall if it was or not. I don't recall if he mentioned termination so I don't recall it was or not.

Q Okay. Well, I mean, did it seem like to you that from what you understood about the situation in December and January that taking them off the campus and out of that committee process was the right response?

A Based on the information that came out of the Grievance Hearing, I would have to say yeah.

Q Okay, based on the information that came out of the Grievance Hearing, but I'm asking you back in December and January when what you had to go on was what Mr. Brezina, I presume, was telling you and the Board. Did it seem like that [sic] *right response? Did you have any,* [p. 34] *you know, concerns about that?*

A I don't recall having any.

Q Okay, you didn't think you know, gosh, shouldn't we, you know, take some other step first?

A I don't remember thinking that, no.

Q Okay. All right, did you hear about a meeting at the mall at which teachers attended?

A No.

Q All right. Mr. Brezina didn't mention anything to you about a meeting at the mall when he called you in December?

A No, not that I recall.

* * *

Witness: Clay Cain Date: 05-21-97
Re: Harris VS V.I.S.D., Et. Al.

* * *

[p. 49] *at the high school; is that correct?*

A. No. That's not correct?

Q. Did the Board go into closed session that night?

A. It did.

Q. Did it receive a report from Mr. Brezina?

A. It did.

Q. Okay. What was the report about?

A. I believe that it was posted on our agenda as a report from the Superintendent on Victoria High School.

Q. Okay. And what did he tell the Board?

A. I don't think I can tell you that.

Q. Okay. I'm not asking about discussions of board members. I'm asking you what Mr. Brezina told the Board.

MR. RAINS: I would object to him revealing that information in that we have a court order from the court in Victoria County, Texas, that said the revelation of that information would be a violation of the Texas Open Meetings Act.

MR. KING: Let's take a break at this time, please.

MS. OWEN: Okay.

(RECESS)

[p. 50] *Q. (By Ms. Owen) Okay. Before your break, Mr. Cain, I was asking you about the closed session in which Mr. Brezina gave a report –*

A. Uh-hum.

Q. – on January 18th, –

A. Uh-hum.

Q. – and I asked you what it was that Mr. Brezina told the board.

A. Okay. Mr. Brezina gave us a report on Victoria High School, and that included information about his transfer of Mr. Harris and Mr. Martin, his reasons for that transfer –

Q. Okay. What did he tell you the reasons for the transfer were?

A. The same thing that he said in the Grievance Hearing.

Q. Which was what?

A. Which was that he did not believe that Mr. Harris and Mr. Martin were committed to the process. He did not believe that they were going to cooperate with that process and thought that their remaining there was not productive.

Q. Okay. So did he speak about any sort of specific conduct on Mr. Harris' and Mr. Martin's part?

A. I'm sure that he would have mentioned the conduct at [p. 51] **the meeting in December.**

Q. Okay. Is that the only conduct you remember him specifically mentioning?

A. I don't specifically remember him mentioning that conduct. I just – I'm sure that he would have talked about –

Q. Well, I'm asking you what you remember.

A. I don't remember any specifics other than, in general, his opinion that they did not – they were not going to work through the process and he didn't believe that they were committed to it. And he didn't think that – that the process could go forward with them staying on that campus.

(CAIN EXHIBIT NO. 34 MARKED)

Q. (By Ms. Owen) Okay. Okay. Mr. Cain, I'm showing you what's been marked as Exhibit No. 34.

A. Okay.

* * *

Witness: Reuban Murray Date: 05-21-97
Re: Harris VS V.I.S.D., Et Al.

* * *

[p. 25] *way you answered the question led me to believe that while perhaps you had not heard about the possibility of them being transferred, you had heard about the possibility of some employment action being taken against them?*

A. No.

Q. Okay. All right. So you heard that they had been transferred. Did you ever hear Mr. Brezina give an explanation for why he had transferred them?

A. Because they were unwilling to work within the system or the parameters that had been given in that plan, whatever it was.

Q. Okay. And did he get anymore specific than that?

A. Not that I recall. It was, basically, because they were unwilling to work within the system.

Q. Okay. But – I mean, did you – Did he say why he had concluded that they were unable to work within the system?

A. He probably did, but I don't remember what – what he said.

Q. Okay. Do you think it's possible that – that it was in that context that he recounted the – the incident where they had supposedly turned their backs on Ms. Porche?

A. It could have been, but I don't know. It could have [p. 26] **been. I really don't know.**

Q. Did you ever hear Mr. Brezina say that – that Mr. Harris and Mr. Martin had been insubordinate?

A. I think that was mentioned about the back turning. It was viewed as an act of insubordination.

Q. By Mr. Brezina?

A. I don't know. Just it was viewed as an act of insubordination. I don't know if it was by Melissa or by Bob. I really don't know.

Q. Okay. But by one – By one or both of them?

A. Well, one of them who's in the authority.

Q. Who's in the – in the chain of authority?

A. Uh-hum. Right.

* * *

[p. 30] *Q. Okay. What did you think about their grievance? Did you think that they had a legitimate grievance?*

A. I didn't – Sitting their listening, I didn't think that they proved that their First Amendment rights had been violated. I work for industry. We move people all the time. It's not a violation of their First Amendment

right, and that's what – that's what I had to base all of my decisions on.

Q. Okay. All right. Did you – Did you have any conversations with Mr. Harris after he had been transferred?

A. Yes. I did.

Q. Okay. And what do you recall about – about those conversations?

* * *

Witness: Ivan Green Date: 05-21-97
Re: Harris VS V.I.S.D., Et Al.

* * *

[p. 25] **A. Okay.**

Q. Do you recall if you heard about that December 8th meeting in between those two dates?

A. I don't remember. I'm sorry. I mean, I – Between that month, I don't remember.

Q. All right. Do you recall a board meeting in between those two dates at which Mr. Harris and Mr. Martin were discussed?

A. No. I don't recall. That's not to say it didn't happen, but I don't recall one.

Q. Okay. Did you ever hear Mr. Brezina give an explanation for why he thought that these two men should be

transferred? You know, what they had done to – to warrant being transferred in his mind?

A. Well, the one thing that I kind of remember, just paraphrasing, was, you know, basically, that they weren't – they had a lack of commitment on, basically, following out with the plan or – or getting this thing resolved is what I kind of – That's paraphrasing. I don't –

* * *

Witness: Paul Kornfuehrer Date: 05-21-97
Re: Harris VS V.I.S.D., Et Al.

* * *

[p. 31] *Q. Okay. That's what he told you?*

A. In so many words, yes.

Q. Okay. Did – Do you remember anything he – anything else he told you that they had done which led him to his conclusion?

A. I – Not that I can recall.

Q. Okay. Did you have an opinion at that time – Let me ask you this first. Did you give him any sort of response to what he was telling you?

A. No. I mean, I – I felt that was his call to make.

Q. Okay. And did you – Did you have any opinion about whether or not that was an appropriate action to take against Mr. Harris and Mr. Martin?

A. You know, not – I mean, not really. I mean, I think, you know, I wasn't in on any of the sessions and – you know. I mean, I – don't think he made this decision lightly. I think he, you know – Bob was always looking for some way to keep everybody happy, and I don't think this was a decision he enjoyed making.

Q. Uh-hum. All right. Now, I don't know if you heard this part of Mr. Cain's testimony or not, but he also testified – I think he did.

A. You don't remember?

Q. I've deposed a lot of people in the last few days, [p. 32] *and I'm getting confused on my – my board meetings. But let me just ask you. Do you remember a board meeting in between the December 8th committee meeting, the Fairman committee meeting, and this phone call that you got from Brezina telling you that he was going to transfer them? Do you remember any board meeting in between those two dates?*

A. Between what now?

Q. Okay. In between December 8th when they had had this committee meeting where –

A. That was the chair turning?

Q. – the chair turning deal and then January 8th when you were notified by Mr. Brezina that he had made the decision to transfer them, –

A. Uh-hum.

* * *

FILED
NOV 4 1999
OFFICE OF THE CLERK

(2)

No. 99-588

In The

Supreme Court of the United States

VICTORIA INDEPENDENT SCHOOL DISTRICT, et al.,

Petitioners,

v.

DWIGHT HARRIS and GENE MARTIN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS BRIEF IN SUPPORT OF PETITIONERS

DAVID J. LABREC
Counsel of Record
KATIE ANDERSON
KATHRYN PETERSON
STRASBURGER & PRICE, L.L.P.
901 Main Street, Suite 4300
Dallas, Texas 75202
(214) 651-4300 (phone)
(214) 651-4330 (facsimile)

Counsel for Texas Association of School Boards and National School Boards Association

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

21K

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

Texas Association of School Boards Legal Assistance Fund ("The Fund") and the National School Boards Association ("NSBA") hereby respectfully move for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for each Petitioner has been obtained. The consent of the attorney for the Respondent was requested but refused.

The interest of the Fund in this case arises from the fact that it represents over 750 school districts in Texas who could be adversely affected by the majority opinion of the Fifth Circuit Court of Appeals, which significantly expands the definition of First Amendment speech involving a matter of public concern and denied qualified immunity to Petitioners by finding the Constitutional issues were clearly established despite the notable absence of any authority in existence at the time of Petitioners' allegedly wrongful conduct.

NSBA represents the nation's 95,000 school board members, who govern more than 15,000 local school districts that serve more than 46.5 million public school students - approximately 90 percent of all elementary and secondary school students in the nation. NSBA has had a longstanding interest in the effective development and implementation of local school board policies, including those touching on the First Amendment and free speech.

In the instant case, Petitioners set forth legal arguments supporting the position that Respondents' speech addressed matters of private, not public, concern. The brief which amicus curiae is requesting permission to file

will demonstrate the errors of the Fifth Circuit in deciding this issue and provide a more comprehensive analysis of the importance of this constitutional issue to school districts.

Respectfully submitted,

DAVID J. LABREC
Counsel of Record
KATIE ANDERSON
KATHRYN PETERSON
STRASBURGER & PRICE, L.L.P.
901 Main Street, Suite 4300
Dallas, Texas 75202
(214) 651-4300
(214) 651-4330 (Telecopier)

Counsel for Texas Association of School Boards Legal Assistance Fund and National School Boards Association

TABLE OF CONTENTS

Page

Statement of Interest of Amicus Curiae 1

Summary of Argument 2

Argument 3

I. The Fifth Circuit improperly broadened the definition of speech involving a matter of public concern..... 3

A. The Fifth Circuit failed to apply the "citizen versus employee" distinction in analyzing the subject matter of Respondents' speech 4

B. The Fifth Circuit improperly applied the test of content, form, and context in determining the nature of Respondents' speech 5

1. Content..... 5

2. Form 6

3. Context..... 7

II. The Fifth Circuit erred by requiring the district to show actual disruption..... 10

III. The Fifth Circuit erred by denying qualified immunity to Petitioners..... 13

Conclusion 15

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635 (1987) 13

Benningfield v. City of Houston, 157 F.3d 369 (5th Cir. 1998) 6

Board of the County Commissioners of Bryan County, Oklahoma v. Brown, 520 U.S. 397 (1997)..... 15

Connick v. Myers, 461 U.S. 138 (1983).....4, 5, 6, 13

Dahm v. Flynn, 60 F.3d 253 (7th Cir. 1994)..... 14

Egger v. Phillips, 710 F.2d 292 (7th Cir. 1983), *overruled on other grounds, Feit v. Ward*, 886 F.2d 848 (7th Cir. 1989)..... 8

Ferrara v. Mills, 781 F.2d 1508 (11th Cir. 1986).....8, 9

Givahn v. Western Line Consol. Sch. Dist., 439 U.S. 410 (1979)..... 6

Gonzales v. Benavides, 774 F.2d 1295 (5th Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986) 14

Greenberg v. Kmetko, 922 F.2d 382 (7th Cir. 1991).....

Harlow v. Fitzgerald, 457 U.S. 800 (1982)..... 13

Harris v. Victoria Indep. Sch. Dist, 168 F.3d 216 (5th Cir. 1999) 3, 4, 5, 7, 9

Harris v. Victoria Indep. Sch. Dist., No. 97-41015, 1999 U.S. App. LEXIS 18305 (5th Cir. July 6, 1999)..... 12

Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988)..... 7

TABLE OF AUTHORITIES – Continued

Page

Johnston v. Harris County Flood Control Dist., 869 F.2d 1565 (5th Cir. 1989) 7

Khuans v. School Dist, 123 F.3d 1010 (7th Cir. 1997) 6, 9, 10, 11, 12

Moore v. Mississippi Valley State Univ., 871 F.2d 545 (5th Cir. 1989) 6

Noyola v. Texas Dep't of Human Resources, 846 F.2d 1021 (5th Cir. 1988) 14

Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty., 391 U.S. 563 (1968) 10, 11, 12

Wales v. Board of Educ., 120 F.3d 82 (7th Cir. 1997) 10

Wallace v. Texas Tech Univ., 80 F.3d 1042 (5th Cir. 1996) 3, 6

Waters v. Churchill, 511 U.S. 661 (1994) 12

Wilson v. U.T. Health Center, 973 F.2d 1263 (5th Cir. 1992) 6

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae, the Texas Association of School Boards Legal Assistance Fund ("The Fund") and National School Boards Association ("NSBA"), submit this brief urging the Court to reverse the decision of the court below.[1] If upheld, the appellate court's opinion will allow disgruntled school employees carte blanche to undermine their supervisors in the name of free speech over matters not of general public concern.

Nearly 750 public school districts in Texas are members of the Fund, which advocates the positions of local school districts in litigation with potential state-wide impact. The Fund is governed by three organizations: The Texas Association of School Boards (TASB), the Texas Association of School Administrators (TASA), and the Texas Council of School Attorneys (CSA). Because they are concerned about the negative impact of the court of appeals' decision, the Fund has paid all costs associated with the preparation of this brief.

TASB is a non-profit, unincorporated association of public school districts in Texas. Approximately 1,047 school districts, through their elected boards of trustees, have joined TASB.

TASA represents school superintendents and other administrators who are responsible for carrying out the educational policies adopted by their local boards of

---

[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

trustees. CSA is composed of attorneys who represent more than 90% of the public school districts of Texas.

The Fund submits this brief out of concern for more than 7,000 school campuses across the state which manage their employees efficiently and provide education to Texas children.

Founded in 1940, NSBA is a not-for-profit federation of state associations of school boards across the United States and the school boards of the District of Columbia, Guam, Hawaii, and the U.S. Virgin Islands.

NSBA represents the nation's 95,000 school board members, who govern more than 15,000 local school districts that serve more than 46.5 million public school students – approximately 90 percent of all elementary and secondary school students in the nation. NSBA has had a longstanding interest in the effective development and implementation of local school board policies, including those touching on the First Amendment and free speech.

SUMMARY OF ARGUMENT

The Fifth Circuit now treats all teacher complaints as matters of public concern. Complaints of this nature have never before been characterized as such. The court erred in requiring Petitioners to prove actual disruption and in denying qualified immunity to Petitioners.

ARGUMENT

I. The Fifth Circuit improperly broadened the definition of speech involving a matter of public concern.

The Fifth Circuit's decision empowers school employees to criticize a supervisor in the name of free speech and public concern because, in this instance, they are on a committee "involved in attempts to raise the level of education."[2]

The Fifth Circuit has never before held that an employee's criticism of a supervisor constitutes a matter of public concern.[3] Previous Fifth Circuit opinions have expressly refused to extend the protection of the First Amendment to such comments, holding instead that employees' speech is of public concern only in cases involving the report of corruption or wrongdoing to higher authorities.[4]

Here, the Fifth Circuit departed from its own precedent by holding that teachers serving on a school improvement committee were entitled to both voice criticisms of their principal during a committee meeting and to disseminate a memorandum criticizing the principal. The court concluded that this conduct was protected speech because they "faced the choice of either telling the truth and fulfilling their duties as committee members or keeping silent and frustrating their purpose and function

---

[2] *Harris v. Victoria Indep. Sch. Dist*, 168 F.3d 216, 222 (5th Cir. 1999).

[3] *See id.* at 225 (Smith, J., dissenting).

[4] *Wallace v. Texas Tech Univ.*, 80 F.3d 1042 (5th Cir. 1996).

on the committee."[5] By failing to consider the content, context, and form, the court would allow employees to speak openly on internal matters not of public concern. Public ridicule of a supervisor to other teachers not involved in the dispute serves only the purpose of disrupting school administration.

A. The Fifth Circuit failed to apply the "citizen versus employee" distinction in analyzing the subject matter of Respondents' speech.

When an employee speaks upon "matters of only personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken allegedly in reaction to the employee's behavior."[6] The "citizen versus employee" distinction is designed to allow public employees to participate in public affairs.[7] The history of First Amendment cases and involving public employees began as an attempt to allow public employees to join political organizations without fear of discharge.[8] Although this Court has since extended such protection, the "citizen versus employee" distinction remains.

Respondents' speech occurred at a meeting attended only by district employees and a hired consultant. They

---

[5] *Harris*, 168 F.3d at 222.

[6] *Connick v. Myers*, 461 U.S. 138, 147 (1983).

[7] *See id.* at 144.

[8] *See id.*

then put a memorandum in teachers' mailboxes calling the principal a vindictive bully who was unable to make decisions, and demanded her resignation. They had no interest other than as disgruntled employees.

Job satisfaction is not a fundamental right. Because the Fifth Circuit failed to correctly apply the "citizen versus employee" distinction, it improperly found that Respondents were speaking on a matter of public concern.

B. The Fifth Circuit improperly applied the test of content, form, and context in determining the nature of Respondents' speech.

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement."[9] Although the Fifth Circuit reiterated the correct test, it defined each element too broadly, resulting in an unworkable standard.

1. Content

The content of Respondents' speech involved internal management issues. The Fifth Circuit has never before held that internal management issues and employee grievances are matters of public concern.[10] Performance and morale at work are matters of private

---

[9] *Connick*, 461 U.S. at 147.

[10] *Harris*, 168 F.3d at 225 (Smith, J., dissenting).

concern.[11] For example, a teacher's complaints that her supervisor was difficult to communicate with and was hostile and argumentative are not matters of public concern.[12]

Speech that involves a matter of public concern includes serious complaints about issues that have "societal ramifications," such as racial discrimination;[13] sexual harassment;[14] corruption;[15] and tampering with government documents.[16]

The speech here involved complaints about performance (poor job implementing the improvement plan) and managerial style (bullying and vindictive). Such complaints do not have the same "societal ramifications" as allegations of theft, racial discrimination, and sexual harassment.

2. Form

Citing cases only involving public employees' sworn courtroom testimony, the Fifth Circuit characterized Respondents' speech as a "truth-seeking process." Here, Respondents were not giving sworn testimony in court.

---

[11] *See Moore v. Mississippi Valley State Univ.*, 871 F.2d 545 (5th Cir. 1989); *Connick*, 461 U.S. at 148-49.

[12] *See Khuans v. School Dist.*, 123 F.3d 1010 (7th Cir. 1997).

[13] *Givahn v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16 (1979).

[14] *Wilson v. U.T. Health Center*, 973 F.2d 1263 (5th Cir. 1992).

[15] *Wallace v. Texas Tech. Univ.*, 80 F.3d 1042 (5th Cir. 1996).

[16] *Benningfield v. City of Houston*, 157 F.3d 369 (5th Cir. 1998).

"[T]he goal of grand jury proceedings, of criminal trials, and of civil trials is to resolve a dispute by gathering the facts and arriving at the truth, a goal sufficiently important to render testimony given in **these contexts** speech of public concern."[17] An internal school committee meeting is not the same. Because schools are not typically public forums, restrictions on speech can be imposed so long as they are "reasonably related to legitimate pedagogical concerns."[18]

If Respondents' speech could be characterized as a matter of public concern simply because they were involved in the "truth seeking process," then the form requirement would be met in every case. Likewise, when a committee meets to discuss any issue, the committee is "seeking the truth." If the only form requirement is whether the speech is made in search of the truth, then every case meets the test.

3. Context

The Fifth Circuit used the backdrop of public debate and the Respondents' "constant involvement in attempts to improve education" to conclude that the context of their speech involved a matter of public concern.[19] The court incorrectly emphasized the public debate element and misconstrued the evidence. Its characterization of the

---

[17] *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1568 (5th Cir. 1989) (quotations and citations omitted).

[18] *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

[19] *See Harris*, 168 F.3d at 222.

context of the speech as an attempt to improve education was erroneous.

While a backdrop of public debate might indicate that a *citizen* speaking on the debated topic would be protected under the First Amendment, the existence of such a debate has no relevance in determining whether a school *employee* was speaking on a matter of public concern in the workplace. Public debate necessarily occurs outside of the workplace and should not affect whether an employee, while at work, speaks on a matter of public concern. The key issue is the context in which the employee comments and whether those comments, in that specific context, are of public concern.

Other circuits have held that the existence of public debate on a subject has limited relevance in determining whether speech involves a matter of public concern. One Circuit has cautioned that "in assessing whether the speech touches upon a matter of public concern, it is important not to equate the public's curiosity about a matter with a matter having societal ramifications."[20] Similarly, another circuit has excluded the degree of public interest in an employee's speech from the analysis of whether that speech involves a matter of public concern.[21]

The proper stage to consider evidence of public debate is only in balancing the employer's interest in

---

[20] *Egger v. Phillips*, 710 F.2d 292, 316-17 (7th Cir. 1983), *overruled on other grounds, Feit v. Ward*, 886 F.2d 848 (7th Cir. 1989).

[21] *See Ferrara v. Mills*, 781 F.2d 1508 (11th Cir. 1986).

efficient operations against the employee's right to freedom of speech.[22] This balancing test occurs only if the employee's speech involves a matter of public concern.[23]

Even if a backdrop of public debate is relevant, no such backdrop was considered by the Fifth Circuit. All of Respondents' speech was made entirely within the school environment. The only connection to any alleged public interest stems from a newspaper article that commented merely on the ratings of the school.[24] There is no evidence that the public was otherwise interested in or aware of Respondents' comments.

The Fifth Circuit majority concludes that Respondents were "constantly involved in attempts to raise the level of education at Victoria High School."[25] Teachers are necessarily involved in (and responsible for) improving education. That is their job. The context of their speech must be more than something job-related to transform it into a matter of public concern. If a teacher's speech is a matter of public concern because the speaker intends to "improve education," then *everything* becomes a public concern.

In *Khuans*, a special education teacher served as "liaison" between other teachers in her department and the administration in communicating concerns about the department. Her comments criticizing the department head, although made in her capacity as "liaison," were still

---

[22] *See id.* at 1514.

[23] *Id.*

[24] *Harris*, 168 F.3d at 226 (Smith, J., dissenting).

[25] *Id.* at 222.

complaints about how her supervisor performed her job, not comments of public concern.[26] The same is true here.

Another clue in analyzing the true nature of speech is the person to whom the statements are made.[27] A teacher's memorandum criticizing her principal does not rise to the level of a public call to change.[28] Similarly, Respondents' comments were directed to fellow teachers, not the general public. They spoke up to air their personal gripes about the principal. The fact that they served on a committee does not change the context.

If speech made in a school committee meeting is public concern, then all speech, no matter how disruptive, is protected. Allowing disgruntled teachers such liberties will render it impossible for schools to function, a concern this Court has specifically recognized.[29]

II. The Fifth Circuit erred by requiring the district to show actual disruption.

Once a court has found that a public employee's speech involves a matter of public concern, the court must then consider whether the interests of the employee, as a citizen, outweigh the interest of the state, as an

---

[26] *See Khuans*, 123 F.3d at 1017-18.

[27] *Wales v. Board of Educ.*, 120 F.3d 82, 84 (7th Cir. 1997).

[28] *Id.*

[29] *See Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 568 (1968).

employer, in promoting the efficiency of the public services it performs through its employees.[30] In doing so, the court should consider the following factors:

> (1) whether the statement would create problems in maintaining discipline by immediate supervisors or harmony among co-workers; (2) whether the employment relationship is one in which personal loyalty and confidence are necessary; (3) whether the speech impeded the employee's ability to perform her daily responsibilities; (4) the time, place, and manner of the speech; (5) the context in which the underlying dispute arose; (6) whether the matter was one on which debate was vital to informed decision-making; and (7) whether the speaker should be regarded as a member of the general public.[31]

Although the Fifth Circuit accurately stated the *Pickering* balancing test, it incorrectly applied it, requiring the district to prove actual disruption.

School administrators have legitimate interests in promoting efficiency and integrity, maintaining proper discipline, and ensuring close working relationships among employees.[32] On Rehearing, the majority here concluded that no balancing was required because one side of the scale sat empty and opined that Petitioners "did not effectively allege that [Respondents'] speech

---

[30] *See id.* at 568.

[31] *Khuans*, 123 F.3d at 1015.

[32] *See Connick*, 461 U.S. at 151.

disrupted the school environment or affected their work in any way."[33]

No such showing is required. This Court has specifically held that "substantial weight [must be given] to government employers' **reasonable predictions of disruption**, even when the speech involved is on a matter of public concern."[34] The public employer should not be required to wait until actual disruption occurs. Where employee speech carries the potential to be disruptive, the public employer must have the ability to move quickly.[35]

Respondents' conduct, their "Concerns" memorandum, and their demands for removal of their principal gave Dr. Brezina reason to believe that their actions "would disrupt the learning environment, undermine the authority of those responsible for the implementation of the plan, and hinder the close working relationships that were necessary in order for the plan to work."[36] The Fifth Circuit is incorrect that "one side of the scale sat empty," and it was error for the court to decline to balance the interests of the district and those of Respondents. To deprive governmental employers of the protection of the *Pickering* balancing test until they prove harm or "actual disruption" ties the hands of educational institutions until after the damage is done. It is for the districts, not

---

[33] *Harris v. Victoria Indep. Sch. Dist.*, No. 97-41015, 1999 U.S. App. LEXIS 18305, at *2 (5th Cir. July 6, 1999).

[34] *Waters v. Churchill*, 511 U.S. 661, 673 (1994) (emphasis added).

[35] *Khuans*, 123 F.3d at 1014.

[36] *Petition for Writ of Cert.* App. at 44-45.

the courts, to exercise such discretion. This Court has recognized that in order to provide meaningful education, administrators must have the "prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch."[37]

III. The Fifth Circuit erred by denying qualified immunity to Petitioners.

Qualified immunity is designed to avoid distractions from governmental duties, inhibition of discretionary action, and deterrence of able people from public service.[38] It shields conduct that does not violate clearly established constitutional or statutory rights of which a reasonable person would have been aware, and the right must be sufficiently clear such that a reasonable official would understand that his conduct violates that right.[39]

Respondents and the Fifth Circuit relied on decisions which were decided after the district transferred Respondents in January, 1996; decisions of which the district could not have been aware.

The fact that both the trial judge and dissenting appellate Justice Smith disagree with the majority obviates that the law was not clearly established.

> "Equivocation by the judges who have examined the situation is the best proof of legal uncertainty, and legal uncertainty confers

---

[37] *Connick*, 461 U.S. at 151.

[38] *See Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982).

[39] *See Anderson v. Creighton*, 483 U.S. 635 (1987).

> immunity. Until the right in question has been 'clearly established,' courts do not demand that public officials dig into their pockets . . . How could anyone say that . . . unlawfulness . . . must have been apparent to . . . a non-lawyer, when with the benefit of hindsight and full reflection, a federal district judge found that [the] . . . acts were *not* unlawful? . . . Government officials must be granted the ability to pass unmolested through bogs of murky legal precedent. They must not become prey to every hypothesis of what the law might have come to forbid had it eventually developed along certain lines. When the law is clear, and an official's duties delineated, then he will not be able to rely on the immunity defense. But we must not and do not demand that every government official become skilled in guessing the future path of the law.[40]

Although the Fifth Circuit recognizes that "*Connick* and *Rankin* exemplify the difficulty of delineating any bright-line constitutional rule that might furnish a test for denying qualified immunity in such actions,"[41] it would require Petitioners to comply with "clearly established" law when the four judges who have already reviewed this case in lower courts cannot agree. The same questions which Justice Breyer recently raised about the meaning of

---

[40] *Dahm v. Flynn*, 60 F.3d 253, 259, 261 (7th Cir. 1994) (Easterbrook, J., dissenting).

[41] *Noyola v. Texas Dep't of Human Resources*, 846 F.2d 1021, 1025 (5th Cir. 1988); *see also Gonzales v. Benavides*, 774 F.2d 1295, 1303 (5th Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986) (stating that "individualized balancing seems preferable to a predictable but inflexible categorical approach . . . because of the variety of circumstances in which public employees speak").

"policy or custom" in 42 U.S.C. § 1983 apply to the qualified immunity issue here:

> "The original principle has generated a body of interpretive law that is so complex that the law has become difficult to apply. Factual and legal changes have divorced the law from the distinction's apparent original purposes. And there may be only a handful of individuals or groups that have significantly relied upon perpetuation of the original distinction. If all this is so, later law has made the original distinction, not simply wrong, but obsolete and a potential source of confusion."[42]

CONCLUSION

The Court is urged to review the Fifth Circuit opinion, reverse it and confirm the trial court ruling that Petitioners are entitled to immunity. To do otherwise effectively sends a message to educators to put down their lesson plans and pick up law books in an attempt to predict the meaning of law upon which jurists on the trial and Fifth Circuit courts cannot agree. Teachers' criticisms of their supervisor were not, and are not, clearly protected speech under the First Amendment.

---

[42] *Board of the County Commissioners of Bryan County, Okla. v. Brown*, 520 U.S. 397, 431 (1997).

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DAVID J. LABREC
Counsel of Record

KATIE ANDERSON
KATHRYN PETERSON
STRASBURGER & PRICE, L.L.P.
901 Main Street, Suite 4300
Dallas, Texas 75202
(214)651-4300 (phone)
(214)651-4330 (facsimile)

Counsel for Texas Association of School Boards and National School Boards Association